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**ARKANSAS REPORTS**  
**VOL. 132**

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**CASES DETERMINED**

**IN THE**

**Supreme Court of Arkansas**

**FROM**

**JANUARY, 1918, TO MARCH, 1918**

---

**JAMES V. JOHNSON**  
**REPORTER**

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1918**



# JUDGES AND OFFICERS

OF THE

## SUPREME COURT

### OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

---

EDGAR A. McCULLOCH, - - - - - Chief Justice

CARROLL D. WOOD, - - - - - Associate Justice

JESSE C. HART, - - - - - Associate Justice

FRANK G. SMITH, - - - - - Associate Justice

THOMAS H. HUMPHREYS, - - - - - Associate Justice

JOHN D. ARBUCKLE, - - - - - Attorney General

WILLIAM P. SADLER, - - - - - Clerk



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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

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EMPIRE CARBON WORKS *v.* BARKER & Co.

Opinion delivered December 22, 1917.

1. **BILLS AND NOTES—SALE OF FERTILIZER—NON-COMPLIANCE WITH STATE LAWS.**—The maker of a note, given for the purchase of fertilizers, may defend the same upon the ground that the sale was made in this State, and that the fertilizer had not been analyzed by the Commissioner of Mines, Manufactures and Agriculture, nor tags affixed as required by law.
2. **FERTILIZERS—SALE OF—OFFERING FOR SALE.**—The Act of 1913, p. 758, amending Act No. 398, Acts of 1907, provides for the registration, sale, inspection and analysis of commercial fertilizers in the State of Arkansas, and requires that the analysis and inspection be made before the fertilizer is sold or offered for sale. *Held*, proof tending to show any overt or individual offer of fertilizers for sale within this State constitutes an "offering for sale" within the State of Arkansas, within the meaning of the statute.
3. **FERTILIZERS—SALE—"OFFER FOR SALE."**—An actual proffer of the sale of fertilizers by an agent of the seller to some particular person within the State of Arkansas, constitutes an "offer for sale within the State," within the meaning of Act 398, Acts of 1907, as amended by Act of 1913, p. 758.
4. **STATUTES—CONSTRUCTION—PENAL STATUTE.**—While penal statutes are to be strictly construed, it is the duty of the court, in construing the statute, to find the legislative intent, and in discovering the intent, the object of the statute should be considered.
5. **FERTILIZERS—"OFFER FOR SALE"—NON-RESIDENT SELLER.**—An agent of appellant, a Missouri corporation, came into Arkansas and solicited the appellee to buy fertilizers from his company;



the parties entered into a written contract in the State of Arkansas, subject to the approval of appellant's home office in Missouri. *Held*, this was an actual proffer of sale within this State to a particular person in the State, and constituted an "offer for sale within the State," of fertilizers, within the meaning of the statute, which requires that such fertilizers shall be analyzed, and the bags tagged in a certain manner.

Appeal from Fulton Circuit Court; *J. B. Baker*, Judge; affirmed.

*Ellis & Jones and Samuel Frauenthal*, for appellant.

1. The court erred in directing a verdict for defendant; it should have directed a verdict for plaintiff.

Under the testimony it was a Missouri sale and not illegal, even though compliance had not been made with the laws of this State. The delivery of the goods to the carrier is the place of sale. 44 Ark. 556; 50 *Id.* 20; 78 *Id.* 123; 79 *Id.* 456; 91 *Id.* 422; 94 *Id.* 318; 92 *Id.* 387; 51 *Id.* 133; 53 *Id.* 196; 22 L. R. A. 425. The carrier is the agent of the buyer and delivery to it completes the sale. 94 Ark. 402; 2 Elliott on Cont., § 1115, 1153; 106 Ark. 477.

If the contract is valid where made, it is valid everywhere, notwithstanding the requirements of the laws of Arkansas. 2 Elliott on Cont., § 1126; 44 Ark. 230; 82 Ga. 438; 77 *Id.* 146; 28 Am. St. 811; 61 L. R. A. 419; 129 Ark. 384.

The notes were payable in Missouri and that is where the contract was finally accepted and completed. 61 Ark. 1; 9 Cyc. 670; 70 *Id.* 493.

2. It was error to refuse a continuance. It was an abuse of the court's discretion. 21 Ark. 460; 85 *Id.* 334; 99 *Id.* 394; 100 *Id.* 301. An amendment was made to the answer on the eve of the trial. 67 Ark. 142; 71 *Id.* 197; 48 L. R. A. (N. S.) 224; 9 Cyc. 124-5.

*Kay & Northcutt*, for appellees.

1. The continuance was properly refused. It is not in the bill of exceptions. 7 Ark. 257; 34 *Id.* 390; 40 *Id.* 116. No abuse of discretion is shown.

2. The place of payment was the place of execution of the note and it was an Arkansas contract. The sale was made in Arkansas. 95 Ark. 421; 105 *Id.* 585, 513; 91 *Id.* 163. Hence governed by Arkansas laws. 105 Ark. 672.

3. The court properly directed a verdict. 120 Ark. 208; 91 *Id.* 340; 84 *Id.* 566; 57 *Id.* 468. See also, 97 Ark. 442; 71 *Id.* 447.

The sale was illegal for failure to comply with the laws of Arkansas by a foreign corporation.

#### STATEMENT OF FACTS.

This was a suit instituted by the Empire Carbon Works against J. C. Barker & Company to recover upon a promissory note. The defendants interposed as a defense to the action that the sale of the fertilizer was made contrary to the statutes of Arkansas and that on this account the contract was illegal and void. The facts are as follows:

The Empire Carbon Works is a corporation domiciled in the City of St. Louis, in the State of Missouri, and is engaged in the sale of fertilizers. J. C. Barker & Company, the defendants, are engaged in business at Viola, Arkansas. The agent of the plaintiff company came to Mammoth Spring, Arkansas, and there made a contract with a representative of the defendants for the sale of fertilizer to the defendants. The price of the fertilizer was agreed upon and a written contract was entered into by the parties subject to the approval of the company at St. Louis. A note for the purchase price was executed and dated Viola, Arkansas, but was made payable in St. Louis, Missouri. The company accepted the contract at its home office in St. Louis, and shipped the fertilizer to the defendants at their place of business in the State of Arkansas. This suit was brought to recover on the note as above stated. The defendants interposed as a defense that the contract had been entered into in violation of our statutes regulating the sale of fertilizers and on that account was illegal and void.

The court directed a verdict for the defendants and from the judgment rendered the plaintiff has appealed.

HART, J., (after stating the facts). In *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, the court held: "The act of the Legislature of North Carolina of January 21, 1891, must be regarded as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the State, and the charge of twenty-five cents per ton is intended merely to defray the cost of such inspection; and as it is competent for the State to pass laws of this character, the requirement of inspection and payment of its cost does not bring the act into collision with the commercial power vested in Congress, and clearly this can not be so as to foreign commerce, for clause two of section 10 of article 1 expressly recognizes the validity of State inspection laws, and allows the collection of the amounts necessary for their execution; and the same principle must apply to interstate commerce."

(1) In *Florence Cotton Oil Co. v. Anglin*, 105 Ark. 672, the court held: "In an action on a promissory note given for the purchase of a commercial fertilizer for an agreed price, it is a good defense that the sale of the fertilizer was made in this State, and that the fertilizer had never been analyzed by the Commissioner of Mines, Manufactures and Agriculture, nor tags affixed to the bags as required by law." This holding was in application of the general rule that a contract to do an act which is prohibited by statute is void and can not be enforced in a court of justice.

Counsel for the plaintiff concede that the inspection laws of the State of Arkansas were not complied with and recognize the principles of law above announced, but they contend that our inspection statute can have no extra-territorial effect, and that there was no completed sale in this State. That under the facts as they appear in the record the transaction was a Missouri con-

tract, and that being a valid contract under the laws of the State of Missouri, it is valid here and that the principles above announced have no application in the present case. Assuming that the sale was completed in the State of Missouri, still we think the transaction falls within the ban of our statute. The agent of the plaintiff company came into the State of Arkansas and solicited the defendants to purchase fertilizers from his company and a written contract for their sale was entered into and signed by them subject to the approval of the officers of the company at St. Louis, Missouri.

(2-4) The Legislature of 1913, passed an act to amend Act No. 398 of the Acts of 1907 providing for the registration, sale, inspection and analysis of commercial fertilizers in the State of Arkansas. Acts of 1913, p. 758. Section 1 of the act provides that all manufacturers, jobbers and manipulators of commercial fertilizers and fertilizer materials to be used in the manufacture of same who may desire to sell or offer for sale in the State of Arkansas such fertilizers and fertilizer materials shall file with the Commissioner of Agriculture upon forms furnished by him, the names of the brand of such fertilizers or fertilizer material, with guaranteed analysis.

Section 2 provides that all persons, companies, manufacturers, dealers or agents before selling or offering for sale in this State any fertilizers or fertilizer materials shall brand or attach to same tags in the manner provided by the statute.

Section 18 provides that any person selling or offering for sale any cotton seed material, fertilizer or fertilizer materials without first having complied with the provisions of this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than \$100 nor more than \$500.

It is insisted that the transaction shown in the record does not constitute an "offer for sale in the State of Arkansas" within the meaning of the statute. It is

claimed that these words are designed to prevent a person or corporation from placing fertilizers in his store or warehouse in this State and throwing open the doors to the public and thus exposing the fertilizers for sale. The majority of the court however, think this is too narrow or restricted a meaning to be given to the words "offer for sale in the State of Arkansas." If this had been the purpose of the Legislature, doubtless it would have used the words "keep for sale" instead of "offer for sale." The majority of the court are of the opinion that the words "offer for sale" should be given a broader meaning. Of course we think that if a person or corporation should keep fertilizers in his store and expose them for sale in the State of Arkansas, this act would constitute an offer for sale. In other words we think that the fertilizer materials could be offered for sale without any overt act of solicitation. We feel equally sure that proof tending to show any overt or individual offer of the fertilizers for sale within the State of Arkansas constituted an "offering for sale" within the State of Arkansas within the meaning of the act. In other words we think an actual proffer of the sale of the fertilizer by an agent of the seller to some particular person within the State of Arkansas constituted an "offer for sale within the State," within the meaning of the statute. In reaching this conclusion we are not unmindful of the legal maxim that penal statutes must be strictly construed. Another cardinal rule of construction is to find the legislative intent and in discovering this the object of the statute should be considered.

In the case of *St. Louis, I. M. & S. Ry. Co. v. Wal-drop*, 93 Ark. 42, the court said: "This statute is a penal law, and the legal maxim is that such a law should be construed strictly. But this does not mean that the words of the statute should be so narrowed as to exclude cases which those words, in their common and ordinary acceptance, would comprehend."

In *State v. Sewell*, 45 Ark. 387, the court recognized that while penal statutes are to be construed strictly we are also committed to the principle that the intention of the Legislature must govern in the construction of penal as well as other statutes and that penal statutes are not to be construed so strictly as to defeat the intention of the Legislature. In that case the court quoted with approval from Bishop on Statutory Crimes, the following: "The rule of strict interpretation does not prevent our calling in the aid of other rules, and giving each its appropriate scope, yet so as not to overturn this one. For example, penal statutes are not to be so construed as to work an absurdity, or defeat their purpose or the process of the court instituted for their enforcement."

The intention of the Legislature in passing statutes of this kind is clearly expressed by the Supreme Court of Alabama in the case of *Steiner v. Ray*, 4 Sou. 172, as follows: "As we understand the statute, its controlling purpose was to guard the agricultural public against spurious and worthless compounds sometimes sold as fertilizers; to fix on sellers a statutory guaranty that fertilizers sold by them contain the chemical ingredients, and in the proportions, represented; and to furnish to buyers cheap and reliable means of proving the deception and fraud, should such be attempted. The accomplishment of these objects will greatly promote the prosperity and success of the agricultural industry, and we do not hesitate to declare that they are strictly within the pale of legitimate police regulation."

It is obvious that if the construction sought to be placed upon the statute by the plaintiff should govern, the object of the statute would in a large measure be defeated. If the agents of persons or companies domiciled without the State could come into the State and solicit orders from persons here and by making the contract subject to the approval of the home office in another State and then ship the fertilizers into the State without complying with the State laws in regard thereto, it is evi-

dent that the purpose of the statute would to a great extent be defeated.

On the other hand the construction the majority have placed upon the statute will effectuate the purpose the Legislature had in passing it and we think we have given a reasonable meaning to the words "offer for sale."

(5) Counsel for the plaintiff in support of their contention cite the case of *Atlantic Phosphate Co. v. Ely*, 82 Ga. 438, 9 S. E. 170. In that case Ely wrote a letter from his home in the State of Georgia to the Phosphate Company in the State of South Carolina for prices of fertilizers. They sent him their printed circular of prices. Whereupon he again wrote them to ship to him in the State of Georgia a certain quantity of fertilizer at the price named in their circular. The company placed the fertilizer upon the cars in the State of South Carolina consigned to him in the State of Georgia. Ely was a farmer and purchased the fertilizer for his own use. He defended a suit by the company for the purchase price on the ground that the fertilizer had not been inspected according to the laws of the State of Georgia. The court held that the contract of sale was a South Carolina contract and denied relief to Ely. The majority of the court think the ruling in that case was correct under the facts stated and that that case is rather an authority against the position assumed by counsel for the plaintiff. In that case the court denied relief to Ely on the ground that there was neither a sale nor offer for sale in the State of Georgia. The only thing that could have been construed in that case as an offer for sale within the State of Georgia was the printed circular of prices sent by the company in response to Ely's request for prices on fertilizers. Here the facts are materially different. An agent of the company came into the State of Arkansas and solicited the defendants to buy fertilizer from his company. A written contract between the parties was entered into in the State of Arkansas subject to the approval of the home office in the State of Missouri. This

was an actual proffer of sale within the State to a particular person in the State and the majority are of the opinion that it constituted an "offer for sale within the State" of fertilizers, within the meaning of the statute.

It is also insisted that the judgment should be reversed because the court refused to grant the continuance asked by the plaintiff. The motion for a continuance is not contained in the bill of exceptions and is not part of the record before us. *Evans & Shinn v. Rudy*, 34 Ark. 383; *Ward v. Worthington*, 33 Ark. 830, and *Phillips v. Reardon*, 7 Ark. 256.

It follows that the judgment will be affirmed.

MCCULLOCH, C. J. and SMITH, J., dissent.

HART, J., (on rehearing). Counsel for appellants, in their brief on the motion for a rehearing, insist that the construction placed by the court upon the fertilizer act in our original opinion can not affect the validity of the note sued on. They insist that the note sued on is not based upon the agreement or negotiation between the representatives of the parties at Mammoth Spring, Arkansas. We do not agree with counsel in this contention.

The representatives of the parties met at Mammoth Spring, Arkansas, and entered into a contract for the sale of the fertilizer. The contract was reduced to writing there and signed by the representatives, subject to the approval of the appellant. It was afterwards accepted by the sales manager of appellant at its home office in the City of St. Louis, Mo. By the terms of the contract the customer was to execute a promissory note to appellant covering all shipments made under the contract. The note sued on was afterwards executed by appellees, at its place of business at Viola, Arkansas, pursuant to the terms of the contract. It was given for the fertilizer shipped under the contract. It is true it was not executed until June 5, 1914, and the contract was dated November 12, 1913; but as above stated the acceptance of the contract by the company at St. Louis was made pursuant to the contract between the representa-



tives of the parties reduced to writing at Mammoth Spring. The execution of the note was provided for in the contract. The whole constituted one transaction and was the direct and immediate result of the proffer of sale by the representative of the appellant in the State of Arkansas. The statute prohibits the offering for sale of fertilizers within the State and the representative of appellant could have been punished under the statute. As we have already pointed out, this overt act of offering the fertilizer for sale in this State resulted in the execution of the note sued on and so the contract was the direct result of doing an act prohibited by statute.

Counsel, also, again earnestly insist that the decision is contrary to the principles of law laid down in *Atlantic Phosphate Co. v. Ely*, 82 Ga. 438, and *Trousdale v. Arkadelphia Milling Co.*, 106 Ark. 477. As we pointed out in our original opinion, the court in the former case held that the sending by the company from without the State by mail to a person in the State, of one of its printed circulars containing the prices of its fertilizers in response to a letter for prices, did not constitute an offer for sale of its fertilizer in the State. The letter was mailed from without the State and the court held that it was not an offer of sale within the State. Here the agent of appellant came into the State and while here committed the overt act of offering the fertilizer for sale. We did not comment on the *Arkadelphia Milling Co.* case in our original opinion, but it in no sense conflicts with our present opinion but is rather in accord with it. *Trousdale* was a broker at Monroe, La., and purchased from the milling company two cars of chops, which the company billed from its mills at Arkadelphia, Ark., to *Trousdale* at Monroe, La., shippers orders. When the cars arrived, they were delivered to *Trousdale's* customers pursuant to his direction. The milling company did not comply with the police regulation of the State of Louisiana requiring food stuffs for use in that State to be tagged. *Trousdale* alleged in his complaint that he suffered a loss

of \$221.25 because the milling company did not comply with the act, and sued it for that amount. The court held that Trousdale as a broker at Monroe, La., was required to comply with the law. The court said that the allegations of the complaint showed an independent contract by which Trousdale represented the dealers at Monroe rather than the manufacturers at Arkadelphia. Trousdale sent in an order for the chops from Monroe, La., to the milling company at Arkadelphia, Ark., and the sale was completed at Arkadelphia when the milling company delivered the chops on board the cars there.

The decision was based on the theory that the milling company made no offer of sale of the chops in the State of Louisiana and for that reason was under no obligation to comply with the statutes of Louisiana. We think it clearly deducible from that opinion that if the court had thought that Trousdale was the agent of the milling company that there would have been an offer of sale of the chops within the State of Louisiana notwithstanding the sale was actually completed at Arkadelphia. The motion for a rehearing will be denied.

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DAVIS v. GROBMYER.

Opinion delivered December 22, 1917.

1. **TAX TITLES—SEVEN YEARS' CONTINUOUS PAYMENT.**—Seven continuous tax payments, under color of title, on the same description, are required to confer upon the taxpayer the benefit of Kirby's Digest, § 5057.
2. **TAX TITLES—UNIMPROVED AND UNENCLOSED LANDS.**—Kirby's Digest, § 5057, has no application to lands which are not unenclosed and unimproved.
3. **LANDLORD AND TENANT—ACTS OF TENANT IN ATTORNING TO A THIRD PARTY.**—Where a tenant enters upon land under a certain landlord, the tenant can not dispute its landlord's title or turn it out of possession by attorning to another claimant of the title.

Appeal from St. Francis Circuit Court; *J. M. Jackson*, Judge; affirmed.

*C. W. Norton*, for appellant.

1. Plaintiff was the owner of the lot and defendants entered as tenants and can not dispute her title. 89 Ark. 368; 63 *Id.* 94; 77 *Id.* 556; 36 *Id.* 451; 83 *Id.* 57.

Her tax deed, if void, was color of title and seven years' payment of taxes on unimproved and unenclosed land gave title. Kirby's Digest, § 5057; 70 Ark. 483; 80 *Id.* 82.

Plaintiff made out her case and it was error to direct a verdict.

*Mann & Mann* and *W. R. Satterfield*, for appellees.

1. Plaintiff's tax deed was void. The land was improved and payment of taxes for seven consecutive years was not shown. 104 Ark. 624; 74 *Id.* 305; 95 *Id.* 7; 89 *Id.* 450; 80 *Id.* 435.

2. Appellees were never tenants of plaintiff, they leased from the railway company. 16 R. C. L. 654, § 142; 27 Ark. 50; 84 *Id.* 220; 98 *Id.* 335.

The testimony of appellant shows (1) she has no title, (2) her lessees were tenants of the railway company, and (3) the proof shows her lease does not cover the premises sued for.

SMITH, J. Appellant brought ejectment to recover from appellees the possession of a portion of lot 7, block 17, as per plat of the town of Forrest City. The property sued for is described by metes and bounds, and is of an irregular shape, and embraces only a small portion of lot 7. As her source of title, appellant alleged that she had bought lot 7 at a sale for the taxes for the year 1887, and had received a clerk's tax deed on May 19, 1899, and had thereafter paid the taxes on said lot for seven consecutive years. An amended complaint was later filed, in which it was alleged that appellees were in possession as appellant's tenants under a lease which had expired. Appellees denied that the property sued for was unimproved and unenclosed, alleged the invalidity of the tax sale, and denied the payment of taxes there-

under. The answer further alleged that the Iron Mountain Railway Company was the owner of the property sued for under proper condemnation proceedings and adverse possession for many years; and appellees denied that they were or had ever been the tenants of appellant, but alleged they were in possession as tenants of the railway company. The railroad ran diagonally through the center of the lot, which for many years had been used as a lumber yard, and which is shown to be near the center of the town of Forrest City. A storage room, which is referred to by the witnesses as the old building, stood for many years on a portion of the lot. Another building has been constructed which the witnesses designate the new building and which is situated, in part, on lot 7. These buildings ran parallel to the railroad tracks, and a portion of each building was situated on both the east and the west half of lot 7. The tax receipts offered in evidence show the payment of taxes from 1899 to 1903 upon the east half of lot 7, and for the years 1904 and 1905 upon the west half of lot 7; and it is also admitted that the tax sale upon which appellant's deed is based is void. In addition to the buildings shown to have been erected upon the lot in question, the testimony also shows, without dispute, that an additional portion of the lot was also used as a driveway in hauling in and out the lumber.

The testimony shows that in 1897 the railway company leased its right-of-way across lot 7 to one E. T. Gray, who erected a building on a portion of it which he used in connection with his lumber business. Gray sold the business to Paslay & Johnson in about 1899, who renewed the lease with the railway company. Johnson sold his interest in the business to Paslay, who continued to operate it for several years until he finally sold out to the Euart-Marshall Lumber Company, who rented from Paslay until his lease with the railway company expired, when that company renewed the lease from the railway company in its own name. This company, however, took a lease on the whole lot from appellant for a period of

three years. In 1908 the Euart-Marshall Company sold the business to appellees, who renewed, in their own name, the lease from the railway company upon the expiration of the lease from the railway company to the Euart-Marshall Company. Appellant applied to appellees to have the lease given by her to the Euart-Marshall Company renewed, but appellees declined to renew it upon the ground that they were the tenants of the railway company, whereupon, after waiting about six years, appellant brought this suit. Appellees deny they were ever the tenants of appellant, or that they had in any manner ever recognized her ownership of any part of lot 7, and they deny that they ever paid her any rent. There is sufficient evidence to raise a question for the jury whether appellees did not, in fact, attorn to appellant by paying a part of the rent which the Euart-Marshall Company had agreed to pay, the payment consisting in the delivery to appellant of a quantity of shingles alleged to have been intended to apply on the rent.

(1) It is apparent that, although appellant's tax deed constituted color of title, she did not acquire the title thereunder by her tax payments. In the first place, she had paid for five years on the east half of the lot and for two years on the west half; whereas seven continuous tax payments, under color of title, are required on the same description, to confer upon the taxpayer the benefit of section 5057 of Kirby's Digest. But such payments could not have conferred title here, because the land was not unimproved and unenclosed. The allegations of appellant's amended complaint contravene the right of recovery through the mere payment of taxes. The land was not unimproved and unenclosed. On the contrary, there has been an occupancy for many years. In the brief for appellant, it is said:

"The plaintiff realized that her right was barred in whatever part of the lot the old building occupied; and she made allowance for the same, by bringing her suit only for that part that had recently been pre-empted by

the defendants for their 'addition' or 'new building,' thus conceding to the railroad all that they had had any long continued possession of."

(2) The proof in the case, as well as the concession of counsel, would make unavailing, so far as the acquisition of title is concerned, the payment of taxes, even though such payments had covered the full period of seven years. *Fenton v. Collum*, 104 Ark. 624; *Rachels v. Stecher Cooperage Co.*, 95 Ark. 7; *King v. Campbell*, 89 Ark. 450; *Wheeler v. Foote*, 80 Ark. 435.

(3) The real question in the case is raised by the amended complaint. Both parties to this litigation invoke the doctrine that a tenant will not be heard to dispute the title of his landlord. As we have said, there is evidence that the Euart-Marshall Company took a lease from appellant, and also that appellees, who bought the business of the Euart-Marshall Company, attorned to her for rent due under this lease. But it is undisputed that, from 1897, when the railway company made the first lease to Gray, it has since been continuously in possession of the disputed land by tenant, and that the Euart-Marshall Company was its tenant when it attorned to appellant, and that appellees were its tenants when they attorned to appellant, if it be conceded that they did so. It is also true that the railway company is not a party to this litigation; but a suit was brought against its tenant, and if appellant prevails in this case the effect of the judgment in her favor would be to oust the tenant of the railway company. The statute permits the action of ejectment to be brought against the person in possession of the premises claimed, or his lessor, or both. Section 2735, Kirby's Digest. And, while a judgment against the tenants of the railway company would not conclude the railway company, such a judgment would change its attitude and compel it to recover on the strength of its own title, after appellant had succeeded to the possession of the premises.

Appellant says here that it is immaterial what her title is, that her tenant, who elected to hold under her, can not question it. But the very rule which she seeks to invoke defeats her recovery. Appellees and their predecessors in title had another landlord, and a prior one, and the one, indeed, under whom they entered, and they are not suffered to dispute its title or to turn it out of possession by attorning to another claimant of the title. The rule in such cases is stated in Underhill on Landlord and Tenant, at section 314, as follows: "Sec. 314. At the common law an attornment by the tenant without the knowledge or consent of the landlord was void, and it in no wise affected the right of the landlord against the tenant, or his remedies to recover the rent or to enforce any covenant binding upon the tenant. This rule of the common law is affirmed by statute in many of the states. In some instances, statutes have been enacted which dispense with the consent of the landlord where the attornment is made to one who purchases at a sale made under a judgment at law or a decree in equity, or to a mortgagee after forfeiture. The common law doctrine of attornment is not enforced in Minnesota. An attornment without the consent of the landlord to one holding a tax title is not valid, and the occupation of the tenant under a lease from the owner of the tax title does not constitute adverse possession against the landlord. Where, after an attornment which is void because it was made without the consent of the landlord, there is no disclaimer of the landlord's title by the tenant brought to the knowledge of his landlord or any act of exclusive ownership by the tenant calculated to apprise him that the tenant is holding adversely for the benefit of a third person, the possession of the tenant is not adverse to that of the true owner. A tenant who has attorned to a purchaser on an execution sale when the execution deed was found to be void, may state the claim of his original landlord in an action brought by the purchaser to recover rent under

the lease. If he shall show that the deed is void, the action to recover rent must be dismissed."

The case of *Kepley et al. v. Scully et al.*, 57 N. E. 187, is very similar to the instant case under the facts. In its opinion in that case the Supreme Court of Illinois said: "Deeds were introduced tending to show the conveyance of the tax title acquired by Roby to the plaintiff in error Kepley. But the latter disclaims any intention of relying upon title in himself under the tax deed executed to Roby. His contention is that the tax deed in question put the title to lot 9 in Roby, and divested the former owner thereof, and that in ejectment it is sufficient to defeat the action to show that the legal title is not in plaintiff, or that the title is in a third party. *Kirkland v. Cox*, 94 Ill. 400. The evidence, however, shows that some time in 1890 or 1891 the plaintiff in error Kepley induced one Holt, who was in possession of the premises as a tenant under the defendants in error, to attorn to Kepley and take a lease from him. This was an abandonment by Holt of his landlords, the defendants in error. 'A tenant in possession under one title can make no valid attornment to any one not in privity with that title.' *Tayl. Landl. & Ten.* (8 Ed.), section 180. 'As a tenant is not permitted to resist the recovery of his landlord, by virtue of an adverse title acquired during the tenancy, if he takes a lease from a third person it is void, and can not work an adverse possession against his landlord.' *Id.*, section 705; *Ang. Lim.* (5 Ed.), section 446. In *Hardin v. Forsythe*, 99 Ill. 312, we said (page 320): 'The same principle which forbids a tenant to dispute the title of his landlord applies to any person who may acquire the possession from, through, or under the tenant. If by collusion with the tenant, or through other means, he is induced to vacate and surrender the possession to a stranger, such person will acquire no greater rights than the one who occupied as a tenant.' Where a tenant takes advantage of his position to turn over the land occupied by him to the holder of a conflicting title, such holder will



not be regarded otherwise than as an intruder; and an intruder upon the possession of one in quiet and peaceable possession of land can not, when sued in ejectment, set up title under a third party, or in himself, to defeat the action. A defendant who invades the plaintiff's possession, and ousts his tenant, has no right, when sued in ejectment, to defend by proving an outstanding title. *Hardin v. Forsythe, supra; Anderson v. Gray*, 134 Ill. 550, 25 N. E. 843."

The law of this subject is stated in accordance with the cases cited at section 142 of the article on Landlord & Tenant in 16 R. C. L., where several annotated cases are cited.

We therefore, announce our own view to be that the Euart-Marshall Company and appellees, having acquired possession as the tenants of the railway company, can not, by private agreement between themselves, and the railway company's tenant, oust the railway company of its possession and put upon the railway company the necessity of bringing suit to recover the possession which it lost when its tenant in possession attorned to another landlord, for such would be the effect of a judgment in appellant's favor against a tenant who alleges in his answer his possession as a tenant of the railway company. It follows, therefore, that the judgment was properly directed in appellees' favor, and the same is affirmed.

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NORTON v. HEFNER.

Opinion delivered October 15, 1917.

1. **PHYSICIANS—NEGLIGENCE OF ANOTHER PHYSICIAN LEFT IN CHARGE OF A CASE—DAMAGES—LIABILITY.**—A physician is not liable in damages on account of negligence of another physician who takes charge of a patient at his request.
2. **PHYSICIANS—SURGEONS—NEGLIGENCE OF ANOTHER PHYSICIAN LEFT IN CHARGE OF PATIENT.**—Defendant operated upon plaintiff, performing the operation successfully and skillfully; being obliged to leave the city, he requested another physician, one M., an interne

at the hospital where the operation was performed, to take charge of the patient. *Held*, under these facts, that defendant was not liable in damages to plaintiff for any negligence of M. resulting in an injury to plaintiff.

Appeal from Crittenden Circuit Court; *W. J. Driver*, Judge; reversed.

*James R. Yerger*, for appellant.

1. Appellant was not negligent and was not liable for any negligence of the physician selected to take charge of the case after he was compelled to leave. 181 S. W. 157; 12 Negl. Comp. Cas. Ann. 882; 65 Ark. 580; 38 Mich. 501; 93 Am. St. 665; 27 L. R. A. (N. S.) 1174.

2. The verdict is excessive. 55 Am. St. 606. There is no evidence to sustain it. 70 Ark. 386; 24 *Id.* 224; 10 *Id.* 309; 7 *Id.* 462; 79 *Id.* 609.

3. A jury can not disregard arbitrarily the uncontradicted testimony of witnesses. 67 Ark. 514; 80 *Id.* 396; 96 *Id.* 37; 101 *Id.* 532.

*Rhoton & Helm* and *Berry & Wheeler*, for appellees; *Gardner K. Oliphint*, on the brief.

1. The law was properly declared in the instructions given. Norton was responsible for the acts of Doctor Henry, under the law of *respondeat superior*. Tiffany on Agency, 9, 10, 507; 65 Ark. 580; Sh. & Redf. on Negl., § 606.

2. There is no error in the instructions. A physician is liable only for *his own* negligence and not for that of any physician *independently* employed by the patient. 7 C. & P. 82; 32 E. C. L. 5100; 127 N. W. 194; 65 N. E. 865; 42 Ark. 551-2.

3. Appellant had given instructions not justified by the law or evidence, but he can not complain. 60 Fed. 365, 376; 30 S. W. 450.

4. The instructions as to the measure of damages were correct. 91 Ark. 343; 98 *Id.* 362.

5. The verdict is not excessive. 122 Ark. 305; 127 Ark. 555; 118 S. W. 338; 35 Ark. 495; 3 Hutchinson on Car., § 805; 46 Neb. 907; 30 L. R. A. 504. A permanent

disability was reasonably shown. 90 Ark. 284; 97 *Id.* 358; 106 *Id.* 186; 65 *Id.* 682.

6. No passion or prejudice of the jury is shown.

McCULLOCH, C. J. The defendant, M. M. Norton, is a physician and surgeon, and this is an action instituted against him by the plaintiff, C. E. Hefner, and his wife Theresa, to recover damages on account of injuries resulting from improper treatment following a surgical operation performed by the defendant.

It is not claimed that there was any unskillfulness or negligence in the performance of the surgical operation, but the contention is that the injury resulted from inattention or unskillfulness on the part of another physician left in charge of the patient by Doctor Norton after the operation was complete. There was a jury trial which resulted in a verdict in favor of each of the plaintiffs.

The material facts necessary to consider in disposing of the case here are as follows:

The defendant was engaged in the practice of his profession at Lake Village, Arkansas. The plaintiffs resided at Marianna, Arkansas, and Mrs. Hefner was afflicted in a way that required a surgical operation involving an incision and entrance into the abdominal cavity. The plaintiffs met a young medical student, named Curran, with whom they were acquainted, and he recommended the employment of Doctor Norton to perform the operation. There is no evidence, however, that there was any business relations existing between Curran and Doctor Norton, but the former was merely a volunteer in recommending the latter as a suitable surgeon to perform the operation. He talked with Doctor Norton over the telephone and made the arrangements for the latter to come to Little Rock and perform the operation at a hospital in this city. The plaintiffs came to Little Rock and Mrs. Hefner was placed in the hospital and Doctor Norton performed the operation with entire success, according to the testimony. Another surgeon of recog-

nized ability in Little Rock was present and witnessed the operation, and there is no question made that it was not skillfully performed. There was also present another young physician who was then an interne in the hospital. In finishing up the operation it became necessary to leave a piece or pieces of gauze in the wound for draining purposes, and this was done. After the operation had been completed Doctor Norton announced that he could not remain in Little Rock any longer, but would have to return to his home at Lake Village, and the question arose between the parties as to who should look after the patient and dress the wound. There was testimony adduced by the plaintiffs which tended to show that Doctor Norton arranged with a young physician who was acting as interne in the hospital to look after the patient until she recovered, and the recovery in this case was based entirely on the theory that the interne was guilty of negligence in failing to remove the gauze at the proper time, and that Doctor Norton was liable in damages because of the alleged negligence of the interne. The court, over the objection of the defendant, instructed the jury, in substance, that if Doctor Norton employed the interne to take charge of the patient for the purpose of dressing the wound and removing the gauze at the proper time, and that the interne was guilty of negligence in failing to properly remove the gauze, the defendant would be liable, and that it was wholly immaterial whether the defendant paid or agreed to pay the interne for his services. There was no testimony in the case that Doctor Norton employed the interne in the sense that he was to pay him anything for his services, but the evidence merely tends to show that the interne, at the request of Doctor Norton, agreed to take care of the patient. According to the undisputed evidence, Doctor Norton left Little Rock shortly after the operation was completed and did not see the patient any more, nor is there any testimony tending to show that Doctor Norton was guilty of any negligence in the selection of the interne, as a proper person to look after the patient and remove the

gauze. The interne was a physician who had been selected by the hospital management to attend patients in the hospital and there was nothing to indicate that he was lacking in qualification for the position.

The evidence adduced and the instructions of the court present squarely the question whether or not a physician is liable in damages on account of negligence of another physician who takes charge of a patient at his request. That question seems to have been settled against the right to recover under those circumstances by a decision of this court in the case of *Keller v. Lewis*, 65 Ark. 578. The facts of that case were that the son of the plaintiff sustained a dislocation of one of the joints in his arm and was taken to Doctor Keller, the defendant, for treatment. Keller was about to leave the city, but gave the dislocated arm temporary treatment and recommended that the patient be taken to another physician with whom Doctor Keller had arranged to look after his patients in his absence. One of the theories in the case was that the other physician was guilty of negligence in failing to treat the dislocated joint at the proper time and the defendant asked the court to give an instruction telling the jury that the defendant could not be held liable for the negligence or want of skill of the other physician. The court refused to give the instruction and this court reversed the judgment on that account. In disposing of the case this court said: "The employment of Doctor Minor constituted an independent contract, and Doctor Keller is not responsible for his negligence or want of skill." The court cited in support of the opinion the case of *Myers v. Holborn*, 58 N. J. L. 193, 55 Am. St. Rep. 606, where under somewhat similar circumstances the New Jersey court held that "a party employing a person who follows a distinct and independent occupation of his own, is not responsible for the negligent or improper acts of the other." This view of the law is based upon the theory that the doctrine of *respondeat superior* applies only in case of the negligence of a servant who acts under the direction and control of the master (*De Forrest v.*

*Wright*, 2 Mich. 368), and does not apply to a physician or other professional man who, when employed, acts upon his own initiative and without direction from others. That idea was clearly expressed by this court in the case of *Arkansas Midland Railroad Co. v. Pearson*, 98 Ark. 399, where it was said: "A physician can not be regarded as an agent or servant in the usual sense of the term, since he is not and necessarily can not be directed in the diagnosing of diseases and injuries and prescribing treatment therefor, his office being to exercise his best skill and judgment in such matters, without control from those by whom he is called or his fees are paid."

Applying that principle to the case in hand, it is clear that the instructions of the court as to liability on the part of the defendant were erroneous. Appellant was not guilty of negligence in the performance of the operation, nor in the selection of a physician to continue the treatment after he left the city. Not being negligent in those respects, he can not be held responsible for the negligence of the other physician who was left in charge, merely because the other physician took charge on his suggestion and arrangement.

There was testimony adduced tending to establish an express agreement on appellant's part to look after the treatment in connection with the other physician who was left in charge of the patient, and to make himself responsible for the latter's conduct and treatment of the patient, but the instructions given by the court do not make appellee's right of recovery depend on the existence of such contract.

Reversed and remanded for a new trial.

## WHITNEY v. MIXON.

Opinion delivered December 22, 1917.

1. **APPEAL AND ERROR—UNDISPUTED FACTS—PLEADINGS TREATED AS AMENDED.**—Pleadings will be treated as amended to conform to undisputed facts, which become part of the record without objection.
2. **REAL ESTATE BROKERS—COMMISSIONS—ABROGATION OF CONTRACT.**—Appellant employed appellee to sell certain land for him. Appellee introduced one B. to appellant, and later B. arranged a sale of the land stating that he was acting for appellee. Appellant asked appellee if this were true and appellee confirmed B.'s statement. The sale was consummated. *Held*, thereafter appellee could not maintain against appellant a separate suit for commissions.

Appeal from Lee Circuit Court; *J. M. Jackson*, Judge; reversed.

*Smith & McCulloch*, for appellant.

1. The contract of June 30 was abrogated and replaced by a subsequent contract made by a representative of appellee, who had authority to make the same. As the evidence was at least conflicting the matter should have been referred to a jury.

2. Appellee is estopped to deny Brickey's authority to change the contract.

*Mann, Bussey & Mann*, for appellee.

1. Appellant seeks a reversal on a theory not in issue in the court below. 104 Ark. 276.

2. He was not misled. The testimony is clear that the sale was made through plaintiff's efforts and agency and the law makes him liable. 96 Ark. 23; 89 *Id.* 195; 89 *Id.* 289. Appellee is not bound by Brickey's contract. The sale was made within the sixty days allowed by the first contract.

**HUMPHREYS, J.** Appellee instituted suit against appellant in the Lee Circuit Court to recover \$1,250 alleged to be due him from appellant as a commission for selling the Red Oak plantation in Lee County, Arkansas,

pursuant to a contract entered into between them on June 30, 1916, to the effect that appellant would pay appellee five per cent., to sell said plantation for \$25,000 cash, within the next sixty days.

Appellee denied liability on the ground that the sale was not made pursuant to the contract of June 30, 1916, but was effected through a contract made between appellant and G. S. Brickey on September 1, 1916, after the expiration of the time fixed in the contract of June 30.

The undisputed facts are in substance as follows: Appellant employed appellee to sell his Red Oak plantation in Lee County within sixty days for \$25,000 cash, and agreed to pay him five per cent. for making the sale. Appellee approached G. S. Brickey with the proposition, who induced Connor Bros. to look at the place with a view to buying same. Appellee went to Texas on a vacation. In his absence G. S. Brickey called appellant, who was in Illinois, over phone, stating that he represented appellee, and arranged for appellant to meet him in Memphis. At the meeting a written contract for the sale of said real estate was entered into between appellant and Brickey, whereby appellant agreed to accept \$25,000 net for the property, and to convey it to Brickey's purchaser for such price as Brickey might sell it for. This contract was dated August 19, 1916, but was not signed until the first day of September, 1916. On September 4 following, appellant wrote to appellee that he had contracted for the sale of said place in Lee County to G. S. Brickey and that Brickey had notified him that he was representing appellee in the sale. On the following day, appellee wrote appellant as follows: "You are correct in saying that Mr. Brickey represented me in the sale of your place. I was away on my vacation at the time, and really should have written you about the trade we had up, as we were practically sure at the time I left here that these gentlemen (Connor Bros.) were going to buy it." The sale to Connor Bros. was completed and appellant refused to pay appellee any commission and this suit was begun.



The court refused to send the case to the jury, and over the objection of appellant instructed a verdict for the amount claimed.

Proper steps were taken, and the cause is here on appeal.

Appellant contends that under the undisputed facts appellee was not entitled to recover and that the court committed error in charging the jury to that effect. It is said by appellant that the second contract abrogated the contract of June 30, upon which appellee predicated his suit. Appellee contends, on the other hand, that appellant tried his case out in the lower court upon the theory that appellee forfeited all right under his contract of June 30, 1916, by failing to make a sale within the time, and that the sale was made, if at all, under a different contract with a third party; and that appellant will not now be permitted to try the case out on the theory that the latter contract abrogated the first. It is true that the substituted answer defended on the ground that the sale was made in pursuance to a contract entered into between Brickey and appellant subsequent to the time specified in the contract made between appellee and appellant; but evidence was introduced without objection to the effect that Brickey represented appellee in making the sale which was consummated. The court will treat the pleadings as amended to conform to the undisputed facts in the case, which became a part of the record without objection. Under the pleadings as amended, the real issue in the case is whether or not the contract of June 30 was abrogated by the contract of September 1. Appellant was induced to make the contract on September 1 with G. S. Brickey, upon the representation by Brickey that he represented appellee with whom appellant had made the first contract. After making the contract of September 1, before closing the deal with Connor Bros., appellant took the precaution of ascertaining from appellee whether G. S. Brickey had authority to represent him in the sale of said land, and informed him that he had signed a written contract for the sale of said real estate

in Memphis with G. S. Brickey. Thereupon, appellee confirmed Brickey in his statement that he was acting for him. It will be observed that the last contract was beneficial to appellant and appellee, in that it provided for a net sale price to appellant of \$25,000 and enlarged the opportunity of appellee for a commission or profit. Appellee was informed by appellant that he had entered into a written contract with G. S. Brickey for the sale of the plantation and that Brickey claimed to represent him in the sale. Appellee immediately informed appellant that he and Brickey had the matter up with Connor Bros. before he left on his vacation and that Brickey did represent him in said sale. If Brickey had no authority from appellee to make a written contract for the sale of the property with appellant, appellee should have immediately informed appellant to that effect. The letter written by appellee used the word "we" in referring to Brickey and himself in connection with the sale to Connor Bros., and in no way restricted Mr. Brickey's authority to represent him in the deal. We think the first contract was abrogated by the last, and that no liability existed in favor of appellee against appellant for commissions under the first contract which constituted the basis of this suit. The court, therefore, committed error in instructing a verdict and rendering judgment thereon in favor of appellee.

The judgment is reversed, and it appearing that appellee has no cause of action under the amended pleadings and undisputed facts in the case, the complaint is dismissed.

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RIDER v. STATE.

Opinion delivered January 14, 1918.

**STOCK LAWS—RE-ENACTMENT OF LAW BY REFERENCE—CONSTITUTIONAL LIMITATIONS.**—Act 310, Acts 1909, created a stock district in Franklin County. Act 145, session 1915, provided "that wherever Act No. 310 of the General Assembly of 1909 now reads, 'Charleston District of Franklin County,' the same shall be amended, and the same is hereby amended to read 'Charleston District of Frank-

lin County and Borham and Wittich Townships of Franklin County." Held Act 145, session 1915, was invalid under art. 5, § 22, Constitution 1874, because the power attempted to be granted under the new statute was not declared on its face, but was given merely by reference to the title of another statute.

Appeal from Franklin Circuit Court, Ozark District; *Jas. Cochran*, Judge; reversed.

*Geo. W. Barham*, for appellant.

No law of this State can be extended by reference to the title only. The statute must be re-enacted. Const. Art. 5, § 22. The act is unconstitutional and void. 126 Ark. 260; 92 *Id.* 155; Kirby's Digest, § 2248.

*John D. Arbuckle*, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

Confesses error. 64 Ark. 83; 102 *Id.* 411; 103 *Id.* 298; 49 *Id.* 131; 52 *Id.* 290; 92 *Id.* 155.

MCCULLOCH, C. J. Appellant was convicted of violating a stock law in Franklin County and he challenges the validity of the special statute creating the stock district on the ground that it was an attempt on the part of the lawmakers to extend another statute by reference to title only without re-enacting the same at length. The original statute creating the stock district was Act No. 310 of the session of 1909, which created a stock district in the Charleston District of Franklin County and prohibited the running at large of live stock and geese in that district.

The General Assembly of 1915 enacted a special statute (Act No. 145, session of 1915) to amend the former statute by adding to the district two other townships in Franklin County, and it is this statute that appellant is charged with having violated by permitting geese to run at large in one of those added townships. The title of the amendatory statute is "An Act to Amend Act No. 310 of the Acts of the General Assembly of 1909" and section 1, which is the whole of the statute, except another section merely containing the emergency clause, reads as follows:

"Section 1. That wherever Act No. 310 of the General Assembly of 1909 now reads 'Charleston District of Franklin County,' the same shall be amended, and the same is hereby amended to read: 'Charleston District of Franklin County and Barham and Wittich Townships of Franklin County.' "

The controlling provision of the Constitution reads as follows:

"No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length." Art. V, Sec. 22.

The Act of 1915 under which appellant was convicted was clearly an attempt on the part of the law-makers to extend the provisions of another statute merely by reference to title without re-enacting and publishing the new statute at length. In construing the provision of the Constitution above quoted this court has always adhered to the rule that "when a new right is conferred or cause of action given, the provision of the Constitution quoted requires the whole law governing the remedy to be re-enacted in order to enable the courts to effect its enforcement," but that if the statute "is original in form, and by its own language grants some power, confers some right or creates some burden or obligation, it is not in conflict with the Constitution, although it may refer to some other existing statute for the purpose of pointing out the procedure in executing the power, enforcing the right, or discharging the burden." *Watkins v. Eureka Springs*, 49 Ark. 131; *Beard v. Wilson*, 52 Ark. 290; *Common School District v. Oak Grove Special School District*, 102 Ark. 411; *State v. McKinley*, 120 Ark. 165; *Harrington v. White*, 131 Ark. 291.

The statute now under consideration falls clearly within the first rule stated above, for the power granted under the new statute is not declared on its face, but is given merely by reference to the title of another statute.

The Attorney General confesses error on the part of the trial court in upholding the statute as a valid exercise of legislative power, and we entertain no doubt that the position assumed by the Attorney General is correct. The judgment of the circuit court is, therefore, reversed, and, as the charge against appellant has no foundation in law, the cause will be dismissed. It is so ordered.

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PLANTERS COTTON & GINNING CO. v. HARTFORD FIRE  
INSURANCE CO.

Opinion delivered January 14, 1918.

**NEGLIGENCE—DAMAGE BY FIRE—BALE OF COTTON—FINDING OF CHANCELLOR.**—In an action for damages against a ginning company for loss of a bale of cotton by fire, *held*, the evidence was sufficient to warrant a finding by the chancellor that the fire was communicated to the bale during the process of ginning, and that the fire so communicated resulted in the damage to the bale complained of.

Appeal from Crawford Chancery Court; *W. A. Falconer*, Chancellor; affirmed.

*James B. McDonough*, for appellant.

1. The evidence of T. J. Clark was inadmissible. 95 Ark. 155; 85 *Id.* 64; 2 Elliott on Ev., § 822.

2. The evidence is insufficient and based solely upon conjecture and inference. The destruction was accidental and created no liability against the ginner. 70 N. C. 596; 64 So. 269; 75 S. E. 943; 50 So. 595; 73 Atl. 565; 140 Ill. App. 633; 111 N. Y. S. 469; 111 S. W. 1086; 99 S. W. 1103; 102 Ark. 581; 105 *Id.* 161; 109 *Id.* 206; 166 S. W. 115; 57 Ark. 402, and many others.

3. The great weight of the testimony is with the defendant. 92 Ark. 359.

*Starbird & Starbird*, for appellee.

1. Clark's testimony was competent.

2. The evidence sustains the judgment and appellant was liable for the loss. 55 Ark. 163; 79 Ark. 616.

McCULLOCH, C. J. The facts of this case are unusual and the principal contention on this appeal is that the finding of the chancellor was based upon mere conjecture as to the origin of the fire which consumed the bales of cotton in controversy, and that the evidence was not sufficient to sustain the decree.

Appellant, the defendant below, was engaged in operating a cotton gin at Alma, Crawford County, Arkansas, and in the course of its business ginned a bale of cotton for a man named Walter Clark, who sold the bale to the Alma Cash Store, a corporation doing business at Alma. The purchaser of the cotton stored the bale on its platform with other bales of cotton, and the next day three bales piled together, including the one purchased from Clark, were found to be on fire. The cotton on the platform was insured by a policy issued by the Hartford Fire Insurance Company, which paid the owner the damage to the cotton and joined the Alma Cash Store in this action against appellant to recover the value of the cotton, alleging that the fire was caused by negligence of appellant's servants in permitting the cotton to get on fire while being baled in the press of appellant's gin.

One of the witnesses introduced by appellees testified as an expert in the handling of cotton, and he identified the origin of the fire in the bale purchased by the Alma Cash Store from Clark, which was the bale ginned and baled at appellant's gin. That witness gave as his reason for reaching the conclusion that the fire originated in the Walter Clark bale the fact that when the fire was discovered the heat was greater under that bale than under the other bales, and the witness also explained the length of time a fire would smoulder inside of a bale of cotton. Other testimony tended to establish the fact that when the Walter Clark bale of cotton was being ginned and baled there was fire amongst the cotton, but its precise location was not discovered, except one witness testified that he smelled fire about this particular bale of cotton.

The evidence warrants the conclusion that in some way a small particle of fire got into the Walter Clark bale of cotton while it was being packed and that the fire smouldered for a time and finally broke out and consumed that and two other bales of cotton owned by the Alma Cash Store. It is not a mere matter of conjecture, but a legitimate inference to be drawn from the circumstances proved in the trial of the cause. The evidence was also sufficient to warrant the finding that the servants of appellant were negligent in failing to discover and extinguish the fire before the bale of cotton left the gin.

The only other assignment of error relates to the ruling of the court in permitting one of the witnesses to state his opinion or conclusion that the Walter Clark bale caught fire while in process of being ginned. The answer of the witness was not given as a mere matter of opinion, but he stated the facts in connection with his statement that he smelled the fire at the time the Walter Clark bale was being ginned. But if it be conceded that this particular statement amounted to a conclusion of the witness, we must indulge the presumption that the chancellor disregarded the incompetent portion of the testimony of the witness and gave effect only to the facts and circumstances testified to by the witness.

Decree affirmed.

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CRISSMAN v. CARL LEE.

Opinion delivered January 14, 1918.

1. **ATTORNEY AND CLIENT—COLLECTION BY ATTORNEY—LIMITATIONS—KNOWLEDGE OF CLIENT.**—Where an attorney has collected money for his client, and has failed to pay over the same, limitations do not begin to run against the client unless the client has notice by some means of the collection, or unless the attorney can show that the client could by ordinary diligence have had knowledge of the collection.

2. **ATTORNEY AND CLIENT—COLLECTION—LIMITATIONS.**—A client may sue his attorney for a sum collected by the latter for him, provided the client sues within three years after he receives notice of the collection.

Appeal from Woodruff Circuit Court, Northern District; *J. M. Jackson*, Judge; reversed.

*J. C. Brookfield*, for appellant.

1. It was error to dismiss as to the bank. The error is apparent from the record. 56 Ark. Law Rep. 219.

2. The suit was not barred. It was brought within three years after plaintiff had notice of the collection, and demand and refusal to pay. 7 Ark. 449; 24 *Id.* 385; 25 *Id.* 462; 25 Cyc. 1086; 8 Ark. 429; 29 *Id.* 99, 108; 64 *Id.* 165; 10 *Id.* 228; 32 *Id.* 131.

#### STATEMENT OF FACTS.

The appellant instituted this suit against the appellees. He alleged in his complaint that Carl Lee was an attorney; that the Woodruff County Bank was doing a regular banking business in the town of Augusta; that appellant owned a mill which was destroyed by fire; that the railroad company acknowledged its liability for the loss and issued its check in payment of the same in the sum of \$500, the check being made payable to J. B. Crissman and H. F. Hinkle; that Carl Lee, without authority or knowledge on the part of the plaintiff, cashed the check at the bank wrongfully and fraudulently; that the bank, having knowledge that Carl Lee was without authority to represent plaintiff, cashed the check; that the plaintiff had no knowledge of these transactions at the time same took place; that he demanded payment of Carl Lee and the bank of the money due him, which they refused to pay.

A demurrer was interposed by the bank, which was sustained, and to which ruling of the court plaintiff excepted, but he did not make this ruling of the court one of the grounds of his motion for a new trial.



On motion of Carl Lee, Hinkle was made a party defendant.

Carl Lee answered, denying the allegations of the complaint, and set up that the check was cashed more than four years before suit was brought, and that the amount collected by him on the check was paid to Hinkle; that the plaintiff, by reasonable inquiry, could have ascertained that fact and he therefore pleaded the statute of limitations.

Hinkle answered, denying the allegations of the complaint, and denied that he had any knowledge that the check was made payable to him, and denied that he had any knowledge of the endorsement on the check. Alleged that after he learned that the check was paid to his attorney he demanded settlement and was paid the sum of \$450.

The appellant adduced evidence tending to prove that he was the owner of the mill; that the check, which was exhibited with his complaint, was given to pay for the loss of this mill; that Carl Lee was not his attorney; that he did not know that Carl Lee represented him in collecting the check. He never endorsed the check and never saw any of the money. He never authorized anybody to collect the money for him. The check was dated September 7, 1911, and the endorsement on same showed that it was paid September 23, 1911. It was in the year 1916 when he first learned that the check was paid. He had not been on speaking terms with Hinkle for years and did not go to him or to Carl Lee and did not know that they had collected the money. He knew that his brother-in-law, Hinkle, had put in a claim for the loss of the mill. He took steps in September, 1911, to prevent the railroad company from settling with Hinkle. When he understood the claim had been allowed by the railroad company he protested against it being paid to Hinkle and did not know that it was paid to him; did not know that Carl Lee had it. He did not know the check had

been sent to Carl Lee until just before the bringing of this suit.

The claim agent of the railroad company testified, identifying the check as one having been executed by the railroad company in 1911. He stated that the names of H. F. Hinkle, J. B. Crissman and E. M. Carl Lee were endorsed on the check, and that all were in the same handwriting.

At this juncture the court interposed and stated, "There is no use to consume further time of the court with this case. The evidence on the part of the plaintiff shows that this draft was issued on September 7, 1911, and that it was paid to one of the parties at that time, and that has been something like five years ago, and this is an action for money had and received and is barred by the statute of limitations." The court then instructed the jury to return a verdict for the defendants, to which ruling appellant excepted. Judgment was entered dismissing appellant's cause of action and in favor of the appellees for costs. The appellant has duly prosecuted this appeal.

WOOD, J., (after stating the facts). The appellant testified that he never authorized anyone to collect the money on his claim for the loss of his mill, and that it was in the year 1916 when he first learned that some one had done so. He did not go to Hinkle and Carl Lee and did not know that they had collected the money. He had not been on speaking terms with Hinkle for years and had not been associated with him. He further testified that he did not know that the check had been sent to Carl Lee until just before the bringing of the suit. He did not sign his name on the back of the check. The check itself shows on its face that appellant was one of the payees, and appellant alleges in his complaint that he never endorsed the check, and that he did not employ Carl Lee to represent him in the matter, and did not know that he had endorsed his name on the check. Carl Lee, in his answer, makes a general denial of the allega-

tion of fraud, but he does not specifically deny that he endorsed the name of Crissman on the check, nor does he deny that he in this way collected the money.

We must assume, therefore, that Carl Lee endorsed the name of the appellant on the check in order to collect the same, and that in so doing he undertook to act as the agent or attorney for the appellant.

Since the pleadings and the evidence tended to prove that appellee Carl Lee, in collecting the money, assumed to act as the agent of Crissman, the latter would not be barred from suing his agent or attorney for the amount so collected, provided he brought the suit within three years after he received notice of such collection. *Leigh v. Williams*, 64 Ark. 165.

The testimony of the appellant tends to show that he had no notice that appellee Carl Lee had collected any money for him. "It is the duty of an attorney or agent who has collected money as such to give notice of the fact to his client or principal within a reasonable time. The statute will not commence to run unless the client has notice by some means, unless the attorney can show that the client, could, by ordinary diligence, have known of the collection." And the burden of showing this is on the attorney or agent. *Jett v. Hempstead*, 25 Ark. 462; See, also, *Whitehead v. Wells*, 29 Ark. 99.

It was at least a question for the jury to say whether or not, under the evidence, the appellant, by the exercise of ordinary diligence, could have known of the collection made by Carl Lee for him, and whether or not reasonable time had elapsed for the appellant to make demand upon Carl Lee for the money.

The court therefore erred in instructing the jury as a matter of law that the appellant was barred by the statute of limitations from maintaining this suit. For this error the judgment is reversed and the cause remanded for a new trial.

## CHICAGO, ROCK ISLAND &amp; PACIFIC RAILWAY Co. v. BUTLER.

Opinion delivered January 14, 1918.

1. **CARRIERS—DAMAGE TO SHIPMENT OF CATTLE—AMOUNT.**—In an action for damages to a shipment of cattle, due to negligence, where it appeared that five of the cattle died, a verdict of \$100 will not be deemed excessive.
2. **CARRIERS—DAMAGE TO SHIPMENT OF CATTLE—LIABILITY.**—Where a shipper is invited by a carrier to tender to it his stock for shipment, and the shipper does so pursuant to this invitation, the shipper may presume that the carrier has provided and will furnish the facilities needed, and if, through the lack of facilities, the shipper be compelled to load his cattle into cars prematurely, and they are compelled to stand in the cars an unnecessarily long time before the cars are put in motion, the shipper may recover damages to compensate the loss sustained thereby.

Appeal from Grant Circuit Court; *W. H. Evans*, Judge; affirmed.

*Thos. S. Buzbee* and *H. T. Harrison*, for appellant.

The verdict is excessive and under the undisputed evidence, no liability was shown. 84 Ark. 311. No negligence was shown, nor proof of overloading or crowding. The facilities were ample and the plaintiff had charge of the loading. He knew the train would not arrive until 9 o'clock. The verdict is not supported by the evidence.

*J. C. Ross*, for appellee.

The verdict is not excessive and is amply supported by the evidence. Negligence was shown. 88 Ark. 138.

**SMITH, J.** This suit was brought to recover damages to a carload of cattle, sustained by reason of the negligence of the railway company in having the cattle loaded and held for so long a time at Fordyce, Arkansas, the point of origin of the shipment, before moving, that seventeen head got down in the car, as a result of which one died and was removed from the car before it was moved, four others died subsequently, and several were badly crippled. Plaintiff sued for \$150, and recovered judgment for \$100. It is said that the verdict is excessive,

and that under the undisputed evidence a verdict should have been directed in favor of the railway company, upon the ground that no liability was shown.

(1) Discussing these questions in the order stated, it may be said that the verdict is not excessive, if there is any liability. The plaintiff testified that one cow died before the car was put in motion, and that four other head of cattle died from the injuries sustained while the car was standing at Fordyce, and several others were injured.

The instructions given by the court were more favorable to the railway company than they should have been, and no exceptions were saved to any instructions given or refused except upon the ground that a verdict should have been directed in favor of the railway company.

It is argued that the jury did not follow the instructions given, and that no liability is shown under the undisputed evidence. There does not appear to be any conflicts in the testimony, as the cause was submitted to the jury on the testimony offered in behalf of the plaintiff alone, and it may be stated as follows: The plaintiff had made arrangements to ship two carloads of cattle on March 11, from Fordyce, Arkansas, to Leola, Arkansas, over defendant's road. On the morning that the cattle were to be shipped, a man by the name of Morgan called the plaintiff and told him that he had some cattle for him and for the plaintiff to come to Fordyce and load them. The plaintiff went to the depot and made inquiry about cars, and was told, if he wanted the cattle shipped, he must get them down to the station so that they could be loaded when the train came. Plaintiff then put in the cattle pen certain cattle referred to by the witnesses as the Morgan cattle, which he had bought that day, and he then told the agent of the railway company that he had two more carloads of cattle coming in, and the agent told him the train would be along about 6 p. m. and to get the cattle in by 5:30 p. m. This conversation occurred about 2:30 p. m. The plaintiff then went ahead and had the

other two loads of cattle brought in and, when he reached the station with the cattle about 5:30 p. m., he was informed by the agent that the train was late and would not arrive until about 9 or 10 o'clock. The stock pen was already filled up with the cattle that he had placed there earlier in the afternoon, so that there was no room in the stock pen for the cattle which plaintiff brought in at 5:30 p. m. The agent suggested to plaintiff that he get a lot in town to put his other cattle in, but plaintiff retorted that it was the railway's business to get the lot, whereupon the agent suggested, as a solution of the difficulty, that the plaintiff load the cattle which were already in the stock pen and make room for the cattle which he had just brought in. This was done, and the cattle were properly loaded between 5 and 6 o'clock p. m., after which the plaintiff went to his supper. Upon his return from supper, he found seventeen head of the cattle down in one car, and eight in the other. Plaintiff and four other men got into the cars and succeeded in getting the most of the cattle up before the train came. The train arrived about 9:30 p. m., when the cars were unloaded and all the cattle came out except the one which was dead. They dragged this one out of the car and left it at Fordyce. The others were then reloaded into the cars except one which sulked and could not be put in the car. This one, too, was left in Fordyce. The train then moved forward and the cattle arrived at their destination without any other untoward incident at 2:30 a. m.

We need not decide whether plaintiff was correct in his assumption that it was the duty of the railway company, and not his own duty, to secure a lot in which to confine the cattle which could not be accommodated in the cattle pen. The agent waived the point and received the cattle for shipment, and they were loaded in cars at his suggestion. It is true the plaintiff then knew the train was late, but the day was approaching its close and something had to be done with the cattle. They had been brought to the station under the direction of the

railway's agent. The railway company knew its facilities and was charged with knowledge of the movement of its trains. In 4 R. C. L. 951, it is said that "where a common carrier accepts live stock for transportation, knowing at the time that the condition of its facilities is such that a loss must result to the shipper by reason of the shipment, such carrier will be responsible for the loss because of its negligence in undertaking the shipment under such conditions." In support of the proposition stated, the author cites the case of *St. Louis S. W. Ry. Co. v. Mitchell*, 101 Ark. 289, 142 S. W. 168. In that case the court approved the following instruction:

"If you find from the evidence that the defendant railway company received two carloads of hogs from the Jonesboro, Lake City & Eastern Railway Company for transportation to East St. Louis, knowing that its stock pens at Jonesboro were so overcrowded that said stock could not be unloaded, then the fact, if it be a fact, that said stock pens were so overcrowded will not excuse the railway company if it is otherwise liable."

The testimony in that case was to the effect that the defendant railway company had the custom of unloading hogs at Jonesboro which it received from the connecting railway for shipment to St. Louis, and that the hogs in question were not unloaded because of the overcrowded condition of its pens. Discussing the law of the case, the court said:

"It is the duty of a common carrier of live stock to furnish all necessary facilities for the proper rest, exercise and refreshment of the animals received by it for transportation. The times when, and places where, rest and refreshment may be necessary must be left to the judgment of the carrier, and not the shipper. The shipper can not arbitrarily demand of the carrier that it unload the live stock at any particular time or place; but where the carrier has established a usage of unloading at a particular place for the proper care and necessary preservation of certain live stock, the shipper, in deliv-

ering his stock to the carrier for transportation without any notice of a change of usage, has the right to expect that such usage on the part of the carrier will be observed, and, if it is not observed, resulting in loss to the shipper, he may hold the carrier responsible for such loss. *Illinois Central Ry. Co. v. Peterson*, 68 Miss. 454; *Missouri, K. & T. Ry. Co. v. Clark*, 79 S. W. 827; *Nashville, C. & St. L. Ry. Co. v. Heggie*, 86 Ga. 210; *McAlister v. Chicago Ry. Co.*, 74 Mo. 351; Hutchinson on Carriers, section 638, and cases cited in note."

(2) So, here, we say that, when plaintiff was invited to tender his cattle for shipment, and when he did so pursuant to this invitation, he had the right to assume that the railway company had provided and would furnish the facilities needed, and if through the lack of them he was compelled to load his cattle into cars prematurely, and they were compelled to stand in the cars an unnecessarily long time before the cars were put in motion, he is entitled to recover damages to compensate the loss sustained thereby. *St. L. & S. F. Rd. Co. v. Vaughan*, 88 Ark. 138.

Judgment affirmed.

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AMERICAN HARDWOOD LUMBER Co. v. THE CITY OF BENTON.

Opinion delivered January 14, 1918.

1. **MUNICIPAL CORPORATIONS—PURCHASE OF LUMBER—LIABILITY.**—A city council passed a resolution authorizing the purchase of certain lumber, to be used in opening a certain street. *Held*, where the resolution was properly passed, the payment of the obligation incurred under it can not be defeated by a showing that the members of the council voted for it under a mistaken apprehension as to the cost, and that otherwise they would not have voted for it.
2. **MUNICIPAL CORPORATIONS—OPENING STREET—PURCHASE OF LUMBER.**—The street committee of a city council had a discretion, under resolution of the council, to open a certain street; and where it exercises that discretion, and opens the street, the city will be liable for lumber purchased and actually used in the work of opening the street.



Appeal from Saline Circuit Court; *W. H. Evans*, Judge; reversed.

*W. R. Donham*, for appellant.

1. The council had the right to open the street and to contract for work and materials necessary. Kirby's Digest, § 5466. Also to delegate this right to its street committee. 105 Ark. 506.

2. The action of the committee was ratified by the city. 87 Ark. 389; 61 *Id.* 397; 67 *Id.* 236; 81 *Id.* 244; 32 *Id.* 531; 81 *Id.* 143.

3. The verdict is contrary to the law and evidence. Instruction No. 8 should have been given.

SMITH, J. Appellant sued to recover the purchase price of a lot of lumber sold by it to the city of Benton. The suit was defended upon the ground that the purchase had been made without authority of law. Issue was joined upon this question, and, in addition, it was contended that the city had become liable for the purchase by ratification.

The city council passed a resolution whereby its street committee was authorized to open Hazel street from Market street to East street in said city, a distance of two blocks. Witnesses detail the occurrence at the meeting of the council at which the resolution was passed, and it was shown that members of the council, who were also members of the street committee, had stated that the cost of the work authorized by the resolution would not exceed fifty or sixty dollars. As a matter of fact, the work cost several hundred dollars, and the bill of lumber sued for amounted to \$179. It was shown that to improve Hazel street as provided in the resolution it was necessary to do considerable grading, and it became necessary to provide a place to dump the earth excavated from Hazel street. There was a deep ditch along Market street which had been washed out by the flow of the surface water down it until its depth was such that, as one witness expressed it, a horse could have been buried in it standing up. The street committee conceived the idea of

putting culverts in this ditch and then filling in with the excavated earth, and the lumber sued for was bought and used for that purpose. Members of the committee testified that in their opinion the saving in the hauling of the earth equaled the cost of the lumber and that the city, without additional cost, succeeded in getting the ditch filled.

It is now contended by appellant that the authority to buy the lumber was necessarily implied, and also that, inasmuch as the city now retains the lumber and uses it as culverts, the purchase of the lumber is ratified, even though it was not authorized.

(1) The court refused to give an instruction numbered 8, requested by appellant, which reads as follows:

“You are instructed that even though you believe that the cost of grading Hazel street was estimated by members of the council, and that they did not believe that the cost would be greater than a given sum, and even though you should further believe that their belief in this respect induced them to pass the resolution to open up Hazel street, yet you are further instructed that this belief on their part was based upon a mere matter of estimate and judgment; and even though the cost of opening said street exceeded the amount which they had in mind at the time of voting for said resolution, yet you are instructed that this did not nullify or in any way interfere with the authority of the street committee to open said street.”

This instruction should have been given. The resolution was properly passed, and the payment of obligations incurred under it could not be defeated by a showing that the members of the council voted for it under a mistaken apprehension as to the cost, and that otherwise they would not have voted for it.

Counsel for appellant invokes the doctrine of the case of *Forrest City v. Orgill*, 87 Ark. 389, and the case there cited to sustain the contention that the city is liable for the lumber by ratification. The case cited quotes from

the case of *Texarkana v. Friedell*, 82 Ark. 531, the following statement of the law:

“A municipal corporation may ratify the unauthorized acts of its agents or officers which are within the scope of the corporate powers, but not otherwise. \* \* \* In order to have ratification, there must be some affirmative action by the proper officers, or some negative action, which of itself would amount to an approval of the matter in question.”

But neither condition exists here. It is not contended that any affirmative action has been taken, and, under the circumstances, mere inaction could not, of itself, amount to an approval of the matter in question. The city had the choice only of remaining inactive or of opening the ditch and digging up the lumber, which would certainly entail a considerable cost. *Venable v. Town of Plummerville*, 130 Ark. 477, 198 S. W. 106.

(2) The court properly gave instructions which, in effect, told the jury that the street committee had a discretion in the performance of their duties in opening Hazel street, and that if, in the exercise of this discretion and in the discharge of this duty, they had bought this lumber and used it for the purpose stated, their action in so doing was within the apparent scope of their authority. And so it was. It is not proper now to review this discretion. The right to exercise this discretion inhered in the committee charged with the performance of the duty which called for its exercise, and the city would, therefore, be liable for the lumber if it was purchased by the committee in discharge of the duties imposed by the resolution under which they claim to have acted.

For the error in refusing to give the instruction set out, the judgment will be reversed and the cause remanded for a new trial.

## MUELLER v. COFFMAN.

Opinion delivered January 14, 1918.

1. **APPEAL AND ERROR—VERDICT—LEGAL EVIDENCE TO SUPPORT IT.**—A verdict will not be disturbed on appeal when supported by any legal evidence, and the court will not consider how greatly the verdict is contrary to the preponderance of the evidence.
2. **WITNESSES—COMPETENCY—BELIEF IN SUPREME BEING.**—A witness expressing the belief that man is punished according to his acts and that the power and disposition to punish comes from an Omnipotent Supreme Being, is not incompetent under article 19, section 1, of the Constitution of 1874, which provides that, "No person who denies the being of a God shall be competent to testify as a witness in any court."
3. **WITNESS—BELIEF IN SUPREME BEING—WRITINGS OF WITNESS AS EVIDENCE.**—In determining the competency of a witness on the ground of disbelief in a Supreme Being, writings of the witness showing atheistic tendencies are admissible.
4. **TRIAL—PREPONDERANCE OF THE TESTIMONY—DUTY TO SET ASIDE VERDICT.**—It is the duty of the trial court to set aside a verdict which he believes to be against the preponderance of the testimony.

Appeal from Greene Circuit Court, First Division;  
*R. H. Dudley*, Judge; reversed.

*R. P. Taylor*, for appellant.

1. The verdict is not supported by the evidence. There is no proof of the agreement by which Coffman was discharged from liability and that Mueller became solely liable, or of the delivery to Mueller as collateral security of certain notes and mortgages. 130 Ark. 374. The evidence at least is vague and conjectural. Really the evidence shows that no notes and mortgages were transferred to Mueller. But the jury totally disregarded this evidence. 54 Ark. 214; 117 *Id.* 483; 118 *Id.* 349; 34 *Id.* 632; *Ib.* 640; 70 *Id.* 385.

2. Outside of Coffman's evidence there is no testimony to sustain the verdict. Coffman was an atheist and incompetent to testify. Art. 19, § 1; art. 3, § 26, Const.; 7 Report, Calvin's Case, 17; Peake's Report, 11; 1 Atk. 21; 7 Conn. 66; Fed. Cases Nos. 17050, 15586; 4 Am. Dec.

179; 2 Har. 37; 17 Ill. 541; 18 Johns (N. Y.) 98; 2 Watts & S. 262; 2 Tenn. 80; 12 Ark. 101; 42 L. R. A. (Ann.) 568; 18 Me. (6 Shep.) 157.

3. The statements of the circuit judge show that the verdict was against the evidence and it should be set aside. 126 Ark. 427; 196 S. W. 477.

The appellee, *pro se*.

1. Appellant agreed to pay the notes—the evidence shows it. The great preponderance is with the appellee. The findings of the jury are in harmony with the evidence and the instruction of the court.

2. The remarks of the judge do not find that the verdict is against the weight of the evidence. There was substantial evidence to support it and the verdict of the jury must be sustained.

3. Coffman was competent to testify under the Constitution, and his testimony is supported by Breckenridge and Newberry.

SMITH, J. The parties to this litigation were among the principal stockholders in the Breckenridge Mercantile Company, a corporation doing business at Paragould, Arkansas, but which changed its name to the Mueller Mercantile Company, under which name it continued in business until its failure in 1911. The corporation had become heavily involved and its paper was maturing and the parties to this litigation had jointly endorsed the two notes herein sued on. This cause was tried upon the theory that Coffman was insisting that the mercantile company pay the notes; while Mueller insisted that the company could not spare the money from its business to do so, and urged that the payment of the notes be postponed, and agreed with Coffman that, if he would consent to the extension of the notes, he (Mueller) would become the payer thereof as between himself and Coffman. This Mueller denied. The notes were not paid when they fell due, and payment was enforced by suit against the endorers, whereupon Coffman brought this suit against Mueller to recover the sum paid by him in

satisfaction of the judgment against him on account of the notes, and he recovered judgment in the court below, and this appeal has been duly prosecuted.

(1) It is first insisted that the verdict of the jury is unsupported by the evidence. But this position can not be sustained, because Coffman testified unequivocally to the existence of the agreement stated above, and we need not, therefore, consider how greatly this verdict is contrary to the preponderance of the evidence, as it has, as a basis, evidence legally sufficient to sustain it.

(2-3) It is argued that the verdict is based upon the testimony of Coffman alone, and that he was an incompetent witness, because of his atheistic belief. Coffman admitted the authorship of some verse, of more or less ambiguous meaning but of atheistic trend, which was published in the local paper, and his examination by opposing counsel indicated the absence of a belief in "the being of a God," but, in response to questions by the court he gave the following answers:

"The Court: Let me ask the witness a question, Mr. Taylor. Do you believe in an omnipotent Supreme Being, who rewards one or punishes him according to his sins committed while here?"

"A. Yes, sir; in a Power; I believe we are punished according to our acts.

"Q. And that that power and disposition to punish comes from an omnipotent Supreme Being?

"A. Yes, sir.

"The Court: I think, Mr. Taylor, under this showing that the witness is competent. Let the objection to his competency be overruled. Recall the jury, Mr. Sheriff."

The introduction of the verse was competent, for, in the case of *Farrell v. State*, 111 Ark. 187, we said:

"The opinion and belief of men can be known only by what they have said or written, and their declarations, either verbal or written, are the proper evidence of their opinion."

But the witness expressed the belief that we are punished according to our acts and that the power and disposition to punish comes from an Omnipotent Supreme Being. One possessing this belief is not incompetent under section 1 of article 19 of the Constitution of the State, which provides that "No person who denies the being of a God shall be competent to testify as a witness in any court."

(4) In overruling the motion for a new trial the court said:

"I must confess that the verdict as returned by the jury was somewhat of a surprise to the court, but as there were disputed questions of fact for the determination of the jury, and, though contrary to the judgment of the court as to what the verdict should have been, I do not deem it proper to disturb the verdict of the jury. I think if you were to take Gordon (meaning Mr. Beauchamp, attorney for plaintiff) to one side and ask him to make a confidential statement, he would doubtless admit that he won a lawsuit which he expected to lose."

Counsel for appellant insists that this statement by the court is an expression of the view that the verdict of the jury was contrary to the preponderance of the evidence. And in this we think he is correct. Such appears to us to be a fair construction of the language of the court. We have pointed out in several cases the difference in the duty to be performed by the trial court in reviewing the verdict of the jury upon a motion for a new trial, as distinguished from the duty of this court in passing upon the sufficiency of the evidence to sustain the verdict. This court does not pass upon or consider any question of preponderance. We consider only the legal sufficiency of the evidence to support the verdict, and, in doing so, give to the evidence having that purpose its highest probative value; while with the trial court a different duty abides. That court sees the witnesses, hears them testify, and is afforded opportunities we can not have to weigh the evidence, and the duty, therefore, properly rests with that court to pass upon the question of preponderance. In

doing this, the court, of course, should give proper weight to the verdict of the jury and should not set it aside lightly, but if it clearly appears, and the court so finds, that the verdict is against the preponderance of the evidence, it becomes the duty of the court to set it aside. Under the statement of the court, set out above, we think the court should have granted a new trial, and it will be now so ordered. *Spadra Creek Coal Co. v. Harger*, 130 Ark. 374, 197 S. W. 705; *Spadra Creek Coal Co. v. Callahan*, 129 Ark. 448, 196 S. W. 477; *Twist v. Mullinix*, 126 Ark. 427, 190 S. W. 851.

HART, J., dissents.

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BOGART & Co. v. FESTUS J. WADE, RECEIVER FOR MISSOURI  
& NORTH ARKANSAS RAILROAD COMPANY.

Opinion delivered January 14, 1918.

1. CARRIERS—RELATIONSHIP BETWEEN SHIPPER AND CARRIER, ESTABLISHED, WHEN.—The relationship of shipper and carrier is established when the possession of the goods passes to the carrier, and nothing remains to be done by the shipper.
2. CARRIERS—DAMAGE TO COTTON ON PLATFORM—DELIVERY—PEREMPTORY INSTRUCTION.—Where cotton, on a carrier's platform, was destroyed by fire, and the evidence is conflicting as to whether the cotton had been delivered to the carrier for shipment, *held*, it was proper for the trial court to refuse to give a peremptory instruction in favor of the shipper, in an action against the carrier for loss by fire.
3. EVIDENCE—COMMUNICATIONS BETWEEN AGENT AND PRINCIPAL.—In an action against a railway for loss of cotton by fire, it was contended that the cotton had not been delivered by the shipper to the carrier for shipment. *Held*, testimony by one M. as to conversations with one B., the shipper's agent, and B.'s statement to M. of his instructions from the plaintiff, received by 'phone, are admissible.

Appeal from Cleburne Circuit Court; *John I. Worthington*, Judge; affirmed.

*Mehaffy, Reid & Mehaffy*, for appellant.

1. A verdict should have been directed for appellant. The railroad is liable unless it shows that the property was placed on its platform without its consent, or



solely upon the condition that the company shall not be liable for damages. 86 Me. 422; 31 Ind. 143; 77 *Id.* 322; 27 S. W. 728; 120 Ark. 595. See also 8 Allen 438; 91 U. S. 454; 86 Ark. 289.

2. Plaintiff's instruction No. 2 should have been given as asked, without modification. 12 S. W. 843.

3. Hearsay evidence was admitted.

*W. B. Smith, J. Merrick Moore and H. M. Trieber,*  
for appellee.

1. Appellant's request for a peremptory instruction was properly denied. A proper case for a jury was made. 120 Ark. 595; 87 Ark. 26-32; 60 *Id.* 333-8.

2. No error of which appellant can complain was committed in the modification of instruction No. 2. 88 Ark. 204.

3. Musick's testimony was proper as to Baxter's report of Bogart's instructions to place the cotton on the platform. Bogart was a party to the suit and the declaration was against his interest.

HUMPHREYS, J. Home Insurance Company brought suit in the name of W. F. Bogart & Co. for its use against appellee in the Cleburne Circuit Court to recover \$750 for the alleged damage done by fire to a lot of cotton placed on appellee's platform at Heber Springs, Arkansas, by W. F. Bogart & Co.

Appellee denied liability on account of the damage done by fire.

W. F. Bogart & Co. placed eighty-eight bales of cotton on appellee's shipping platform at Heber Springs, Arkansas, which was damaged to the extent of \$750 by fire caused by the emission of sparks from appellee's engine. W. F. Bogart & Co. had insured the cotton against loss by fire with appellant, Home Insurance Company. The Home Insurance Company paid the loss to W. F. Bogart & Co. and procured an assignment of its cause of action against appellee.

Upon authority of said assignment appellant brought and prosecuted this suit upon the theory that the cotton

was placed upon the platform by W. F. Bogart & Co. and received by appellee in the usual way for shipment. Appellee defended upon the theory that the cotton was not placed upon the platform for shipment by W. F. Bogart & Co., but that it was placed on said platform over the protest of the railroad company and was left there at the risk of W. F. Bogart & Co.

(1) It is insisted by appellant that the undisputed evidence disclosed that the cotton was placed upon the platform and accepted by the railroad company for shipment; therefore, that the court erred in refusing to peremptorily instruct a verdict for it. The test as to whether the relation of shipper and carrier had been established is, Had the control and possession of the cotton been completely surrendered by the shipper to the railroad company? Whenever the control and possession of goods passes to the carrier and nothing remains to be done by the shipper, then it can be said with certainty that the relation of shipper and carrier has been established. *Railway Co. v. Murphy*, 60 Ark. 333; *Pine Bluff & Arkansas River Ry. v. McKenzie*, 75 Ark. 100; *Matthews & Hood v. St. L., I. M. & S. Ry. Co.*, 123 Ark. 365.

It is undisputed that the fire which caused the damage originated from sparks emitted by appellee's engine; that in the months of January and February, 1915, William Baxter purchased cotton in and about Heber Springs, Arkansas, for W. F. Bogart & Co., and placed same on appellee's shipping platform; but the evidence is conflicting as to whether the cotton was placed on the platform for immediate shipment. On direct examination G. W. Musick, agent for the railroad company, testified that he told William Baxter, purchasing agent for W. F. Bogart & Co., not to place the cotton on the platform unless it was intended for immediate shipment, and that if he left it there without taking bill of lading out for same, the railroad company would not be responsible for damage to it by fire; that if left there it would have to be at the risk of W. F. Bogart & Co. On cross-examination he wavered somewhat and declined to state definitely

whether he used either the word "risk" or "fire" or both. He stated that Baxter told him he would notify W. F. Bogart & Co. of the situation by telephone, and afterwards informed him that W. F. Bogart 'phoned him to place it on the platform; that he was putting it there for shipment and had more to haul; that he never issued a bill of lading to persons who had from 40 to 100 bales of cotton to ship until they got it all hauled and on the platform; that he received the cotton like he always received cotton, with the understanding that it would be shipped when it was all hauled in.

William Baxter testified that in the month of February, 1915, he purchased and placed on the platform eighty-eight bales of cotton for W. F. Bogart & Co.; that his instruction was to place the cotton on the platform for shipment in a day or two; that the agent objected to him putting the cotton on the platform until ready to take out bill of lading; that he then called up Mr. Bogart and was instructed to go ahead and put the cotton on the platform; that the agent stated he would not be responsible for anything in the way of a loss from fire or otherwise, for it was against the rules of the company to let it be placed there under such conditions.

The cotton remained upon the platform eight or ten days, without any shipping orders being given, before injured by fire.

(2) Under the facts in this case, the most favorable statement in behalf of appellant is that the evidence was conflicting as to whether the cotton was placed on the platform and received by the railroad company for shipment. It certainly can not be said that the undisputed evidence showed that the control and possession of the cotton had passed out of W. F. Bogart & Co. into the railroad company. It being uncertain as to whether there was a completed delivery, the court did not err in refusing to give the peremptory instruction in favor of appellant.

It is insisted, however, by appellant that the court erred in modifying instruction No. 2, offered by appellant. That instruction is as follows: "If you find from

the evidence in this case, either direct or circumstantial, that fire was caused or set out by an engine on the Missouri & North Arkansas Railroad, destroying the property mentioned in plaintiffs' complaint and the cotton was placed on the platform in the usual way, then the defendants are liable, and it is wholly immaterial whether the defendants were guilty of any negligence or not. If fire were set out by the locomotive and destroyed the property, your verdict must be for the plaintiffs."

The court modified the instruction by inserting the words "for shipment" after the word "way." We think the instruction as originally asked was too indefinite and uncertain to convey any real meaning to the jury. It was necessary to insert the words "for shipment" in order to present the real and only issue in the case. The only issue in the case was whether or not the cotton was placed on the platform for immediate shipment and received by the railroad company for that purpose.

(3) It is insisted that the court erred in permitting G. W. Musick to testify concerning statements which Baxter told him were made to Bogart and by Bogart made to Baxter with reference to placing the cotton on the platform. When the agent objected to Baxter placing the cotton on the platform, Baxter reported the situation to Bogart by telephone. Bogart then instructed Baxter to leave the cotton on the platform and Baxter reported the attitude of Bogart to Musick. In conveying the message from Musick to Bogart and Bogart's response to Musick, Baxter was acting within the scope of his authority, and we think the evidence clearly admissible. The court did not err in admitting it.

The judgment is affirmed.

## KING, ADMINISTRATOR, v. ALLEN.

Opinion delivered December 22, 1917.

1. **APPEAL AND ERROR—DIRECTED VERDICT—ACTION TO RECOVER CERTAIN FUND—DENIAL OF POSSESSION OF OR OF INTEREST THEREIN.**—In an action by an administrator against A. and B. to recover a certain fund of the estate alleged to be in their hands, where B. answered stating that he did not have possession of the fund, and that he claimed no interest therein, it is proper for the trial court to direct a verdict in B.'s favor.
2. **GIFTS—INTER VIVOS—ELEMENTS.**—To constitute a valid gift *inter vivos*, the donor must have been of sound mind, must have actually delivered the property to the donee, and must have intended to pass title immediately, and the donee must have accepted the gift.

Appeal from Lafayette Circuit Court; *Geo. R. Haynie*, Judge; affirmed.

*D. L. King*, for appellant.

1. It was error to direct a verdict for Pleas Allen, the gift was testamentary in its character, and not a gift *inter vivos*. The verdict is not supported by the evidence. 110 Ark. 117.

2. The court erred in giving instruction No. 3. It is not the law, and repugnant to the other instructions. The word "otherwise" covers everything on earth save only a gift.

HART, J. D. L. King, as administrator of the estate of J. C. Gore, deceased, and Alice Gore, widow of said J. C. Gore, instituted this action in the circuit court against Lucinda Allen and Pleas Allen to recover the possession of the sum of \$945 alleged to belong to the estate of J. C. Gore, deceased, and to Alice Gore. The facts are as follows:

J. C. Gore and Alice Gore were husband and wife. They separated. J. C. Gore came to live with his cousin, Lucinda Allen, in Lafayette County, Arkansas, in November, 1912, and continued to live there until his death, which occurred in January, 1914. Alice Gore during this time resided in the State of Texas. Pleas Allen was

the husband of Lucinda Allen. J. C. Gore paid his board and at the time of his death only owed his cousin \$1.50.

Lucinda Allen testified that J. C. Gore was her first cousin, and that they had been raised together; that he had no children and after his separation from his wife he came to live at her house; that during his last illness and about one week before he died he called her to his bedside and gave her \$945; that she accepted the money and has held it as her own ever since that time; that he handed the money to her after he had been sick three or four days.

Pleas Allen testified that he did not have the money in his possession and had never claimed any interest in it and did not at the time of the trial claim any interest therein. It appears from the record that the plaintiffs in this suit first brought an action in the probate court and that the testimony of Pleas Allen and Lucinda Allen was reduced to writing in that suit. The probate court dismissed the case for want of jurisdiction, and this suit was subsequently brought in the circuit court. The testimony of Lucinda Allen, reduced to writing in that case, was introduced in evidence in the present case. In it she stated that J. C. Gore had lived at her house over one year before he died; that Gore and his wife had separated in 1911, and that his wife lived in the State of Texas; that Gore had stated to her that he did not want his wife to have any of his money; that he first wanted to give the money to her, and said that he wanted her and her husband to have it; that later he said that he wanted her uncle and her mother to have a part of it; that she had not turned over any of the money to her mother and uncle; that she first objected to taking the money but subsequently he handed the money to her, and that she asked him what he wanted her to do with it and he replied, "Do what I told you to do with it at first;" that she kept the money and claimed it as her own.

The jury returned a verdict for the defendants and from the judgment rendered the plaintiffs have appealed.

The court directed the jury to return a verdict in favor of Pleas Allen but submitted to the jury the question of whether or not the plaintiffs were entitled to recover against Lucinda Allen.

(1) It is first insisted that the action of the court in directing a verdict in favor of Pleas Allen was erroneous. Counsel for Pleas Allen filed a separate answer for him, in which he denied that he had ever had possession of any of the money in question and disclaimed any interest therein. He testified in positive terms that he did not have the money in his possession and did not claim any interest therein. His wife without objection stated that she alone had received the money and that she still had it in her possession and claimed it as her own. Under this state of the record, the court was correct in directing a verdict in favor of Pleas Allen.

(2) It is also contended by counsel for the plaintiffs that the gift must, under the circumstances, be treated as testamentary in its character. We do not agree with counsel in this contention. The transaction here shown by the evidence, if believed by the jury, constitutes a gift *inter vivos*.

In the case of *Lowe v. Hart*, 93 Ark. 548, the court held that to constitute a valid gift *inter vivos*, the donor must have been of sound mind, must have actually delivered the property to the donee, and must have intended to pass title immediately, and the donee must have accepted the gift. The court submitted the case to the jury under the principles of law just announced under instructions asked both by the plaintiffs and by the defendants.

Mrs. Allen testified before the jury that her cousin called her to his bedside after he had been sick three or four days and handed the money in question to her; that she accepted it and from that time on held it as her own; that Gore died in about one week after he gave her the money. We quote from her testimony in the record as follows:

"Q. Now, as I understand you, Mr. Gore in his lifetime gave you \$945?

A. Yes, sir.

Q. Did you accept that money, Mrs. Allen?

A. Yes, sir.

Q. And have held it as your own?

A. Yes, sir."

From this testimony the jury was warranted in returning the verdict for Mrs. Allen.

Finally it is insisted that the court erred in giving the jury instruction No. 3, which is as follows: "As to whether or not the money in question was the property of Mrs. Lucinda Allen, Mrs. Mattie Watkins and William Green, by gift 'or otherwise,' from Mr. Gore, is a question of fact for you to determine from all the facts and circumstances in evidence before you in the case."

The objection made by counsel to this instruction is the addition of the words 'or otherwise' to the word "gift." We do not think the jury could have been misled by this instruction. All the other instructions given to the jury both at the request of the plaintiffs and the defendants predicated the right of Mrs. Allen to hold the money on the question of whether or not the transaction constituted a gift *inter vivos*. All the proof was directed to that issue. If counsel thought that the words 'or otherwise' were calculated to mislead the jury, a specific objection should have been made at the time to them and doubtless the court would have changed the verbiage of the instruction. Not having made a specific objection to the instruction, plaintiff is not now in an attitude to complain.

It follows that the judgment must be affirmed.



FAUCETTE, MAYOR, *v.* GERLACH.

Opinion delivered January 21, 1918.

1. MUNICIPAL CORPORATIONS—IMPEACHMENT OF MUNICIPAL JUDGE—NATURE OF PROCEEDINGS.—The acts of a city council in impeaching a municipal judge are judicial in their nature, and where the accused has been granted a public hearing, and has been represented by counsel, it is proper for the council to retire and consider their verdict in secret.
2. MUNICIPAL CORPORATIONS—OFFICIAL ACTS OF DE FACTO JUDICIAL OFFICER.—The official acts of *de facto* judicial officers, within the scope of their jurisdiction are as valid and binding as the acts of *de jure* officers.
3. MUNICIPAL CORPORATIONS—IMPEACHMENT PROCEEDINGS—VALIDITY OF ACT OF DE FACTO ALDERMAN.—A city council undertook to impeach the municipal judge of the city, on account of misconduct in office. One R. had been duly elected alderman, and had qualified and had held the office and acted as alderman for some time. R.'s vote was necessary to sustain the impeachment. *Held*, R.'s acts as a *de facto* officer were valid, although in fact he was not a qualified elector of the city, he not having paid his poll tax.

Appeal from Pulaski Circuit Court, Third Division;  
*G. W. Hendricks*, Judge; reversed.

*J. F. Wills*, *Robt. L. Rogers* and *R. E. Wiley*, for appellants.

1. Roberts was at least a *de facto* alderman, and his acts are valid and binding and can not be collaterally attacked. 38 Conn. 449; 9 Am. Rep. 409; 25 Ark. 336; 55 *Id.* 81; 1 Dillon, Mun. Corp. (4 ed.), § 276; 52 Mo. App. 540; 24 Wend. 520; 47 N. J. L. 383; 48 *Id.* 613; 10 Okla. 741; 54 L. R. A. 513; 131 Ky. 537; 115 S. W. 772; 61 Vt. 616; 49 Ark. 439; 3 Head (40 Tenn.) 690; 48 Me. 79; 96 Pa. 344; 121 N. W. 614.

2. The authority of a *de facto* officer can not be collaterally questioned. 118 U. S. 425; 105 Me. 224; 24 L. R. A. (N. S.) 408; 49 Ark. 439; 55 *Id.* 81; 61 Vt. 616; 48 Me. 79; 39 Am. Dec. 231-3-4; 14 Wash. 236; 23 N. Y. 293. Judicial officers are within the rule.

*A. Gerlach* and *Hal L. Norwood*, for appellee.

1. The cases cited do not apply. None of the reasons given in those cases exist in this case. 40 S. W. 650,

139 Mo. 106. Mr. Roberts was objected to before the trial because he was not an elector, and this is not a collateral attack.

2. The proceedings were secret, behind closed doors, and void. Kirby's Digest, § § 5607, 1522.

#### STATEMENT OF FACTS.

This appeal involves the validity of impeachment proceedings against James Gerlach, judge of the municipal court of the city of Argenta.

In April, 1915, James Gerlach was elected judge of the municipal court of Argenta for a term of four years. On March 5, 1917, impeachment proceedings were instituted against him on the ground of drunkenness. On March 8, 1917, the city council of Argenta organized itself into a court of impeachment for the trial of Gerlach. Objection was made to Mord Roberts serving as a member of the court of impeachment because he was not a qualified elector. Roberts was duly elected and qualified as a member of the city council and had been acting as such since said election for a period of nearly two years at the time of the impeachment proceedings. He was not a qualified elector of the city of Argenta at the time of his election as such member of the council and since that time, because he had not paid his poll tax as required by the statute. On this account an objection was made to his sitting as a member of the court of impeachment. Mord Roberts voted for the impeachment of James Gerlach and without his vote the resolution impeaching Gerlach would not have received the vote of two-thirds of the members elected to the council as required by the statute. James Gerlach was impeached by the city council of Argenta and removed from the office of judge of the municipal court on March 8, 1917. On March 14, 1917, Gerlach filed in Pulaski Circuit Court a petition for *certiorari* against the mayor and council of Argenta for the purpose of quashing the impeachment proceedings. On final hearing the circuit court quashed the proceedings and from the judgment rendered this appeal is prosecuted.

HART, J., (after stating the facts). In the discussion of the validity of the acts of an officer *de facto* because of ineligibility, Judge Constantineau said:

"A person who enters into an office and undertakes the performance of the duties thereof by virtue of an election or appointment, is an officer *de facto*, though he was ineligible at the time he was elected or appointed, or has subsequently become disabled to hold the office." Indeed, it is settled by a current of authority almost unbroken for over 500 years in England and this country, that ineligibility to hold an office does not prevent the ineligible incumbent, if in possession under color of right and authority, from being an officer *de facto* with respect to his official acts, in so far as third persons are concerned. The reason of the rule is that "the eligibility of an officer is as difficult of ascertainment as his actual election, and sound policy requires that the public should be no more required to investigate the one than the other, before according respect to his official position." Constantineau on the De Facto Doctrine, § 151. On the same question Judge Cooley said:

"An officer *de facto* is one who by some color of right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact. His color of right may come from an election or appointment made by some officer or body having colorable but no actual right to make it; or made in such disregard of legal requirements as to be ineffectual in law; or made to fill the place of an officer illegally removed; or made in favor of a party not having the legal qualifications; or it may come from public acquiescence in the officer holding without performing the precedent conditions, or holding over under claim of right after his legal right has been terminated; or possibly from public acquiescence alone when accompanied by such circumstances of official reputations as are calculated to induce people, without inquiry, to submit to or invoke official action on the supposition that the person claiming the office is what he assumes to be." Cooley on Constitutional

Limitations (7 ed.), pages 897 and 898. Continuing, the learned author said: "But for the sake of order and regularity, and to prevent confusion in the conduct of public business and insecurity of private rights, the acts of officers *de facto* are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State or by some one claiming the office *de jure*, or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an officer *de facto* are as valid and effectual, while he is suffered to retain the office, as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. This is an important principle, which finds concise expression in the legal maxim that the acts of officers *de facto* can not be questioned collaterally." *Ib.* 898.

Chancellor Kent said: "In the case of public officers, who are such *de facto* acting under color of office by an election or appointment not strictly legal, or without having qualified themselves by the requisite tests, or by holding over after the period prescribed for a new appointment, as in the case of sheriffs, constables, etc.; their acts are held valid as respects the rights of third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice." Kent's Commentaries, (14 ed.), Vol. 2, p. 295.

In *Mayo v. Stoneum*, 2 Ala. 390, the court held that the official acts of a judge *de facto* whose title to the office has not been adjudged insufficient are valid and irreversible. In that case it was assigned as error that the individual who presided at the term of the court when the judgment was rendered, though duly elected judge, was constitutionally ineligible at the time of his election.

In *McClendon, Mayor, v. State ex rel.*, 129 Ark. 286, 195 S. W. 686, this court held that the qualifications of *de facto* aldermen to serve could not be inquired into in a collateral proceeding, such as the city's mandamus suit

to compel the mayor to execute and sign a contract as directed by an ordinance passed over his veto by a vote to which the votes of the aldermen were essential.

In the case of *Lockhart v. City of Troy*, 48 Ala. 579, it was held that the official acts of a person disqualified to hold office by reason of his participation and aid to the Confederate States against the United States was not void, when such person holds his office under authority of the rightful government of the State, until after his right to the office is determined against him in some legal way. See also *Fancher v. Stearns*, 61 Vt. 616; *Hooper v. Goodwin*, 48 Me. 79; *Farrier v. State ex rel. Dugan*, 48 N. J. L. 613, 7 Atl. 881; *In re Collins*, 75 N. Y. App. Div. 87, 77 N. Y. Supp. 702; *Morford v. Territory*, 10 Okla. 741, 54 L. R. A. 513; *Johnson v. Sanders*, 131 Ky. 537, 115 S. W. 772.

In *State ex rel. Brockmeier v. Ely* (N. D.), 14 L. R. A. (N. S.) 638, the court, in discussing the validity of the acts of a *de facto* officer as to third persons and the public, held that by "third persons" is meant those persons having business of an official character with such officer, and not third persons in the usual legal sense in which the term is used.

The acts of the city council in relation to the impeachment of Gerlach were in the nature of judicial proceedings. The general rule is that the official acts of *de facto* judicial officers, within the scope of their jurisdiction, are as valid and binding as if they were the acts of *de jure* officers. Constantineau on the De Facto Doctrine, par. 422, and authorities *supra*. This rule was recognized by this court in *Keith v. State*, 49 Ark. 439.

Roberts was duly elected and qualified and was acting as alderman when he participated in the trial of Gerlach. His title to the office had not been questioned and had not been adjudged insufficient. He was recognized as a member of the council by the public. He was an officer *de facto*, and as such his acts were valid.

It is, also, contended that the impeachment proceedings were void because a part of the proceedings were secret. The record shows that Gerlach was given a pub-

lic hearing and had counsel to represent him. After the witnesses were examined and the matter was submitted to the council for its decision, the members retired into a private room for the purpose of deliberation. There was nothing wrong in this. As we have already seen, the impeachment proceedings were of a judicial nature, and it was entirely proper for the members of the council to retire for the purpose of considering their verdict.

It follows from what we have said that the circuit court erred in quashing the impeachment proceedings, and the judgment will be reversed and the petition of Gerlach for a writ of *certiorari* will be dismissed here.

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BAILEY & Co. v. SOUTHWESTERN VENEER Co.

Opinion delivered January 21, 1918.

APPEAL AND ERROR—CONFLICTING TESTIMONY—SUBMISSION TO JURY.—

Where the testimony is conflicting it is error to withdraw the case from the jury.

Appeal from Woodruff Circuit Court, Southern District; *J. M. Jackson*, Judge; reversed.

*Jonas F. Dyson*, for appellant.

1. It was error to direct a verdict for appellees. There was an issue of fact to be submitted to a jury. 112 Ark. 305; 126 *Id.* 257; Act No. 81, Acts 1913, § 137.

*Harry M. Woods*, for appellees.

A verdict was properly directed as there was no question of fact for a jury. 126 Ark. 257; 57 *Id.* 561; 69 *Id.* 562; 97 *Id.* 438; Act 81, Acts 1913. There was no legal evidence of liability.

MCCULLOCH, C. J. This is the second appeal in the same case, the facts being stated in the opinion delivered on the former appeal. 126 Ark. 257.

The issues are the same as on the first trial, and also the testimony adduced in support thereof, except that in the last trial the defendant introduced as a witness Mr.

Lovelace, the manager, and he denied that he accepted payment of the draft or agreed to do so, and also testified that the draft was accidentally lost. He admitted, however, that he had stated to witnesses that the draft had probably gone to the waste basket. The court gave a peremptory instruction in favor of the defendant and plaintiffs have appealed.

Under the law of the case, as stated in the former opinion, the evidence adduced in the last trial was sufficient to warrant a submission of the issue to the jury whether or not the draft had been wrongfully destroyed or lost by accident. It is true that Lovelace testified on behalf of the defendant that he did not intentionally destroy the draft, but lost it by accident, but there is testimony to the effect that he had told other parties that he had thrown the draft into the waste basket and burned it up, and this constituted a conflict in the testimony to be settled by the verdict of the jury.

It was error, therefore, for the court to withdraw the case from the jury. Reversed and remanded for a new trial.

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MAYO v. ARKANSAS VALLEY TRUST CO.

Opinion delivered December 22, 1917.

1. **DESCENT AND DISTRIBUTION—PERSONAL PROPERTY—RIGHTS OF WIDOW, CREDITORS AND COLLATERAL HEIRS—DOWER.**—Where deceased left a widow and collateral heirs only, under Kirby's Digest, § 2709, the widow takes as her dower one-third of the personalty as against creditors, and one-half as against collateral heirs; though the widow can take only one-third as against creditors, she is entitled to one-half as against collateral heirs, even though it takes all of the remainder to pay the debts, and if more than one-half of the estate is required to pay the debts, the widow is, as against collateral heirs, entitled to the remainder. *Semble*. The same rule applies to realty which constituted a new acquisition of the decedent.
2. **DOWER—RENTS FROM REAL PROPERTY.**—Under the statute, the widow is given the same proportion of rents collected from the real property of deceased, whether the rents be treated as personalty or part of the realty.

3. **ADMINISTRATION—DOWER—WRONGFUL APPROPRIATION OF FUNDS TO PAY DEBTS.**—A wrongful appropriation of funds of the estate by the executor, belonging to the creditors or heirs, to the discharge of that part of an encumbrance upon the estate, to which the widow's dower was subject, would call for the application of the doctrine of subrogation so as to compel the widow to contribute her proportion to the discharge of the encumbrance.
4. **ADMINISTRATION—DISCHARGE OF MORTGAGE—CONSENT OF THE PARTIES.**—Where a mortgage upon property of the estate is discharged by the executor from funds derived from the rent of all the property of the estate, with the consent of the widow and heirs, the parties can not thereafter object, and ask for an accounting of the funds so applied.
5. **DOWER—PROPERTY IN ANOTHER STATE—CONFLICT OF LAWS.**—Where deceased died leaving real property in another State, the rights of the widow in the rents derived therefrom will be determined by the laws of the State where the property is located.
6. **ADMINISTRATION—OPERATION OF BUSINESS—PROFITS.**—The rights of the widow in the personal estate of the deceased husband are fixed by the amount of the property as it stands at the date of the death of the husband; the executor is without authority to operate deceased's business, and does so at his peril; but when he does operate it, he must account for a profit earned, and the widow is entitled to her proportion thereof, for the reason that the earned profit is treated as a portion of the estate as it existed at the time of the death of the testator.
7. **DOWER—REAL AND PERSONAL PROPERTY.**—Under the statute, the widow's dower is divided into two classes for the purpose of estimating dower, real and personal, and dower is to be set apart in each class separately, and no deficiency in one class can be made up from the other. The widow is entitled to one-third of the rents as against creditors, and one-half as against collateral heirs.
8. **DOWER—MORTGAGED PROPERTY.**—A widow is not entitled to dower in mortgaged property free of the encumbrance.

Appeal from Sebastian Chancery Court, Fort Smith District; *W. A. Falconer*, Chancellor; reversed.

*Hill, Fitzhugh & Brizzolara*, for appellant.

1. The chancellor erred in his construction of the statute as to the widow's dower. The estate was a new acquisition, and as between the widow and collateral heirs the widow was entitled to one-half of the gross amount of the estate, personalty, realty and rents. Kirby's Digest, § 2923; 75 Ark. 240; 116 *Id.* 427; *Ib.* 400.



2. The amount found in the decree is erroneous under the theory adopted by the court. Kirby & Castle's Digest, § § 79, 190; 2 Woerner, Adm., § § 337-9, 340-44; 60 Ark. 461; 20 S. E. 431; 58 *Id.* 540.

3. The widow was entitled to dower in the Pabst mortgage rents without deduction for the debt. 55 Ark. 225; 68 *Id.* 449; 121 *Id.* 64; 58 Me. 271; 15 N. H. 38; 29 *Id.* 564; 14 Cyc. 918; 7 Cranch, 370; 1 Scribner on Dower, 377; 1 Woerner, Adm., 237.

4. She was entitled to dower in the Ohio rents and the net profits of the business. 1 Woerner, Admr., p. 261.

5. The widow was entitled to subrogation to the rights of creditors. 17 Ark. 581; 52 *Id.* 499; 68 *Id.* 499.

*Read & McDonough and C. A. Reid*, for appellees.

1. The court properly construed the statute.

2. Rents before and after death of testator were properly construed and distinguished. 14 Cyc. 102; 49 Ark. 87; 46 *Id.* 373; 21 *Id.* 62; 14 Cyc. 104; 116 Ark. 400.

3. A reasonable construction of the statute makes it immaterial whether property is real or personal. Black on Int. Laws, 104-6, § § 48, 74. The widow was not entitled to subrogation. 102 Ark. 322.

4. The widow should be charged with one-half the Pabst mortgage. 14 Cyc. 291; 15 N. H. 38, 43; 29 *Id.* 564; 5 Johns. (N. Y.) 482; 37 Me. 516; 22 Cent. Dig. 306; 14 Cyc. 922; 61 Mich. 608, 620-22; 18 Atl. 374-89, etc.; 2 Washb., Real Prop., 565-6; 55 Ark. 225; 68 *Id.* 449.

5. The widow was not entitled to dower in the Ohio rents. Code Ohio, § 8606; 80 Oh. St. 71; 11 Oh. Ct. Ct. (N. S.) 474; 6 C. C. 570; 22 Oh. Ct. Ct. 409, 416; 55 Ark. 225.

6. Upon the widow's election, the trust estate for her benefit terminated and appellees are entitled to immediate possession. Jarman on Wills, 539; 101 U. S. 788; 249 Ill. 606; 234 *Id.* 407; 82 Ky. 5; 106 Pac. 1038; 2 Jarman on Wills, 945, 1378; 141 Pa. St. 201; 32 N. J. Eq. 597; 81 Iowa, 701; 147 S. W. 25, etc.

**McCULLOCH, C. J.** Dave Mayo, a citizen of the State of Arkansas, and a resident of the city of Fort Smith, died in the year 1908, leaving a large estate, consisting of personal property and real estate in Fort Smith. He left a widow, Sallie E. Mayo, the plaintiff in this case, and certain collateral heirs, but no children or other descendants. He executed his last will and testament in which the Arkansas Valley Trust Company, one of the defendants, was named as executor, and after the will was probated said defendant qualified as executor and took charge of all of the property of the estate, both real and personal, in this State, and has managed said property since that date, receiving all the personal property and collecting the rent of the realty without objections from either the heirs or the widow. Within apt time after the will was probated the widow renounced any claim thereunder and elected to take her dower, and she instituted the present action in the chancery court of Sebastian County against the executor and heirs to have her dower ascertained and set apart to her. The personal estate of said decedent, exclusive of the minimum allowance of dower under the statute, was more than sufficient to pay the debts of the estate, and payments on dower were made to the widow from time to time without the ascertainment or adjudication of the extent of her rights. There is a controversy now as to the extent of the widow's rights and this appeal involves the solution of those questions.

We find it unnecessary to state all the details of the controversy for the reason that we have reached the conclusion that the chancellor erred in his construction of the statute of this State with reference to the dower rights of the widow, and the decree must be reversed. There is little, if any, controversy concerning the facts, and a statement now of the law applicable to the case will enable the chancellor to readily apply the facts when the case is remanded for further proceedings.

The principal controversy turns upon the construction of the following statute, declaring the dower rights

of a widow where there are no children or other descendants of the decedent:

"If a husband die, leaving a widow and no children, such widow shall be endowed in fee simple of one-half of the real estate of which such husband died seized, where said estate is a new acquisition and not an ancestral estate; and one-half of the personal estate, absolutely and in her own right, as against collateral heirs, but, as against creditors, she shall be endowed with one-third of the real estate in fee simple if a new acquisition and not ancestral, and of one-third of the personal property absolutely. Provided, if the real estate of the husband be an ancestral estate she shall be endowed in a life estate of one-half of said estate as against collateral heirs, and one-third as against creditors." Kirby's Digest, § 2709.

(1) The real estate owned by Dave Mayo constituted a new acquisition, and this fact brings the case within the operation of the statute just quoted. One-half of the personal property was insufficient to pay the debts, but it did not require two-thirds of the personalty for that purpose. It is conceded that the widow is entitled to one-third of the estate, both real and personal, regardless of the amount of the debts, but the controversy arises over the proper rule of division where, as in this case, more than one-half, but less than two-thirds, of the personal estate is required for the payment of the debts. The defendants contend and the learned chancellor held that under those circumstances the widow, being entitled to one-third in any event, the balance of the personalty after paying the debts should be equally divided between the widow and the collateral heirs. That is not a correct interpretation of the statute, which means that the widow, where there are no children, takes as her dower one-third of the personalty as against creditors and one-half as against collateral heirs. It means that, though the widow can take only one-third as against creditors, she is entitled to one-half as against collateral heirs, even though it takes all of the remainder to pay the debts, and that if

more than one-half of the estate is required to pay the debts, she is, as against collateral heirs, entitled to the remainder. There is, we think, no reason for construing the statute to mean that where more than one-half of the estate is required to pay the debts, the surplus over the one-third which the widow is entitled to as against creditors should be divided between her and the collateral heirs. The collateral heirs get nothing under the statute unless one-half of the estate is more than sufficient to pay the debts, and then they get what is left out of that one-half after the payment of the debts, but in no event can their rights encroach upon the rights of the widow who is given a preferential right to one-half of the estate as against collateral heirs. The same rule applies as to realty which constituted a new acquisition of the decedent, but we are only discussing the question of the rights in the personalty inasmuch as it is conceded that the real estate is not needed for the payment of the debts.

Counsel for defendants argue the injustice of this interpretation of the statute, but with that we have nothing to do. It may be stated, however, in reply to that suggestion that it has been the plain policy of the laws of this State to favor the widow as against collateral heirs, and that policy is made manifest in the plain letter of the statute now under consideration. It was doubtless thought by the lawmakers that the moral claims of collateral heirs upon the estate of a decedent were so remote that they ought not to participate in the estate unless something is left after the widow is given one-half and the debts of the decedent paid out of the other one-half. It is not within the province of the court to find fault with the policy of the lawmakers, even if different views concerning that policy should be entertained.

The conclusion is reached, therefore, by a majority of this court that the chancellor erred in confining the rights of the widow to one-half of the surplus personal estate in excess of one-third after payment of debts.

There is a further controversy between the parties concerning the disposition of the rents collected by the

executor of the real estate owned by the decedent. It appears from the record that without objections from either the heirs or the widow—in fact it was with the acquiescence of them all—the executor took charge of the real estate, though not needed for payment of the debts, and rented the property and collected the rents from the time of the decedent's death up to January 1, 1916. The executor received gross rents aggregating \$13,775.44, and paid out for taxes, repairs, insurance, etc., \$3,364.15, leaving a net sum of \$10,411.29. The property consisted of a lot referred to as the "beer depot" and two storehouses on Garrison avenue. The amount of the rents of the beer depot was \$2,830 gross. There was a mortgage on the beer depot executed by the decedent to the Pabst Brewing Company to secure a debt which, with accumulated interest, amounted to \$4,936.90, and the executor paid the mortgage out of the rents collected.

(2-4) The question is earnestly debated whether the rents from the realty should be treated as personalty or as a part of the real estate, but in view of the fact that the widow's rights are not affected by the determination of that question, she being given the same proportion under our statute whether the rent be treated as personalty or as a part of the realty, it is immaterial to decide that question. This court decided in *Stull v. Graham*, 60 Ark. 461, that rents accruing after the death of the owner from a lease for a term of years executed by the owner is personal property which goes to the representative of the decedent, but the converse of that proposition is that rents accruing after the death of the owner not arising from a lease executed by him constitute accumulations from the real estate, as contended by counsel for defendants, and should be treated as real estate. We do not deem it necessary to settle that controversy, for, as before stated, the rights of the widow are not affected by it. She is in any event entitled to her proportionate part of the rents whether they be treated as part of the personalty or as accumulations from the realty. The statute (Kirby's Digest, § 77) provides that until the widow's dower be

apportioned she shall be paid her proportion of the rents of the realty, and her rights under that section have been fully recognized in decisions of this court. *Meniffee v. Meniffee*, 8 Ark. 9; *Trimble v. James, Admr.*, 40 Ark. 393. Her proportionate part of the rents under Kirby's Digest, section 2709, as hereinbefore interpreted, is one-third as against creditors and one-half as against collateral heirs. The widow's dower rights in the real estate were subject to the mortgage thereon, and if the dower had been assigned while the property was thus encumbered the portion set aside to her should have been subject to one-half of the encumbrance. *Hewitt v. Cox*, 55 Ark. 225; *Salinger v. Black*, 68 Ark. 449; *Crosser v. Crosser*, 121 Ark. 64; *Less v. Less*, 131 Ark. 232. A wrongful appropriation of funds of the estate belonging to the creditors or heirs to the discharge of that part of the encumbrance to which the widow's dower was subject, would call for the application of the doctrine of subrogation so as to compel the widow to contribute her proportion to the discharge of the encumbrance. *Salinger v. Black, supra*. It appears, however, that the executor collected the rents and discharged the mortgage out of the same, with the acquiescence of all of the parties in interest, using the rent derived from the mortgaged property *pro tanto* and the balance out of the rents of other real estate. This having been done with the consent of the parties, it is too late now for either to ask for a change of the rule and an accounting of the funds so applied. The only fair and equitable method to dispose of this feature of the controversy is to treat the net amount of the rents after payment of the mortgage debts as the proper amount for distribution and to dispose of it in accordance with the terms of the statute regulating the widow's dower.

(5) Mayo owned a small piece of real estate situated in the State of Ohio, which was formerly his home when he lived in that State. Its value is shown to be about \$1,000 with rental value of \$6.50 per month. Since the death of Mayo the property has been occupied by one of the collateral heirs. Of course, it is conceded that the

widow's dower in land situated in the State of Ohio is fixed by the laws of that State, but it is contended by counsel for the widow that the rent which has accrued since the death of the testator should be treated as part of the personal estate which is subject to distribution here at the domicile of the testator. It is shown under the laws of the State of Ohio to a widow is not entitled to rents out of real estate of which she is to be endowed until after a petition for assignment of dower has been filed in the court of proper jurisdiction. *Fast v. Umbaugh*, 22 Ohio Cir. Ct. R. 409. It results from that state of the law that the widow can claim nothing here out of the rents of the property in Ohio. Any other remedy she may have for assignment of her dower in the Ohio real estate must be pursued there and must be controlled by the laws of that State.

(6) There is another item in the report of the executor which forms a part of the controversy in this case. It is the item of \$573.56, shown to be the profits resulting from the operation of the business of the decedent by the executor. The statement in the report of the executor is ambiguous in that the item is referred to as gross profits, but the executor charges itself with the full amount which is tantamount to treating it as the net profits of the business. The rights of the widow in the personal estate of the deceased husband are fixed by the amount of the property as it stands at the date of the death of the husband, but there was no authority for the personal representative to operate the business, and he did so at his peril. However, when a profit is derived the trustee must account for it, and the widow is entitled to her proportion for the reason that the earned profit is treated as a portion of the estate as it existed at the time of the death of the testator. The widow is entitled to her proportionate part of that item, treating it as personal property belonging to the estate.

It is believed that this discussion is sufficient to enable the chancellor to allot the dower of the widow without further controversy as to her rights. The decree is,

therefore, reversed and the cause remanded for further proceedings in accordance with this opinion.

McCULLOCH, C. J., (on motion to modify opinion). Learned counsel for defendants contend that the conclusions of law announced in the original opinion were based on a misconception of the facts concerning the quantity of the property of the estate necessary to pay the debts, and of the rulings of the chancellor as to the law applicable thereto, and they express the fear that if the opinion stands as written it will lead to the conclusion that we mean to hold that the shortage in the widow's allowance of dower out of the personalty should be made up from the realty.

(7-8) We do not think that the opinion can be so construed, even if it be found that the facts are not as assumed, but, to allay the fears of counsel, we say that the chancellor was correct in holding that under the statute the widow's dower "is divided into two classes for the purpose of estimating dower, real and personal," and that the dower "is to be set apart in each class separately and no deficiency in one class can be made up from the other."

Answering the further inquiry of counsel, we say that in case that two-thirds of the personal property is insufficient to pay the debts, the same rule of apportionment of the rents applies as that stated in the opinion with reference to the personalty, except as to the deduction of the amount used in discharge of the mortgage, which constituted an encumbrance on the real estate; that is to say, the widow is entitled to one-third of the rents as against creditors, and one-half as against collateral heirs. What we meant to hold concerning the widow's share of the rents is that she would not have been entitled to dower out of the mortgaged property free of the encumbrance, if the encumbrance had not been discharged by the executor out of the rents, and that the rents used in discharge of the encumbrance should, under the facts



of this case as decided in the original opinion, be deducted from the gross amount, and dower assigned out of the balance—one-third as against creditors and one-half as against heirs.

SMITH, J., (dissenting). In my opinion the court below properly construed the section of the Digest quoted in the majority opinion, section 2709, Kirby's Digest. This construction was substantially that the widow shall receive one-third of the personal property, and one-third of the real estate, and the creditors two-thirds until all debts are paid, and whatever of said personal or real property remains after payment of debts and dower in this manner shall belong, one-half to the widow and one-half to the collateral heirs. The section of the statute under review is a dower statute. The court said of it in the case of *McGuire v. Cook*, 98 Ark. 118: "The interest which the widow possesses in the lands of her deceased husband is known as dower. \* \* \* By this enactment we do not think the Legislature intended to create in the widow an estate in her deceased husband's lands different in any essential from the estate of dower known at the common law, except as therein expressly provided." And, in the case of *Jameson v. Davis*, 124 Ark. 402, the court said of this same section: "While the statute enlarges the quantity and extends the duration of the estate, it in no manner changes the character of the estate nor the method by which it is set apart or allotted to the widow."

By the common law there was no dower in the personal estate. Dower in the personalty was given in this State by the statute on the subject approved February 28, 1838. Section 21 of this act reads as follows: "If a husband die, leaving a widow and no children, such widow shall be endowed of one-half of the real estate, and also one-half of the slaves of which said husband died seized, and one-half of the personal estate, absolutely and in her own right." Revised Statutes, chap. 52, p. 339.

This statute was construed by this court in the case of *Brown v. Collins*, 14 Ark. 421. where the court said:

"The question presented is whether or not, under the provision of the twenty-first section of our statute of dower (Dig., ch. 59, p. 448), when the husband dies, leaving a widow and no children, she takes one-half of the real estate, and one-half of the slaves of which he died seized, absolutely and in her own right, or only a dower estate in them, for the full term of her natural life; and we think it perfectly clear, when this section is considered in connection with the other provisions of the dower law, that she takes only a dower interest and estate for life.

"It is manifest that if she takes the slaves, absolutely and in her own right, she takes the real estate in the same way, and this would be in conflict with the policy of our statute of descents, of preserving the inheritance in the blood of the first purchaser, subject to dower in the common law sense of that term; as to the duration of the estate. It is only when there are no kindred, either paternal or maternal, capable of inheriting, and next before it escheats, that real estate descends from the husband to the wife, or *vice versa* (Dig., ch. 56, § 7). It would be easy to show, by enlarging upon this view of the subject, that if the widow could take one-half of the land absolutely, and not a dower estate in it for life only, the Legislature had really achieved much less than half they evidently designed by the system of descents they set on foot."

This opinion was delivered at the January term, 1854, of the court, and no change was made in this section except by the digester to conform it to the Thirteenth Amendment to the Federal Constitution, abolishing slavery, until the passage of the act of March 24, 1891, which became, and is, section 2709 of Kirby's Digest.

In determining the meaning of this section, it is proper and necessary to consider the state of the law at the time of its enactment. In the case of *Brown v. Collins*, *supra*, the court held that "the term dower has a common law meaning, importing an estate for life, not to be controlled without a contrary intention clearly manifested by the statute." This court said of this statute

in the case of *Arbaugh v. West*, 127 Ark. 105, that "the purpose of the statute was to enlarge the widow's dower by the substitution of a fee simple estate for an estate for life." But in doing so, the Legislature also manifested its purpose and intention to take care of the interest of creditors and collateral heirs. This fee simple estate was given only when the estate was a new acquisition, evidently upon the theory that the wife had contributed to the accumulation of an estate of that character; but the rights of creditors remained unchanged against estates even of that character; and, it appears to me that a consideration of the law of dower, and of our legislation on the subject, as well as the language of the section quoted, make it certain that the collateral heirs were not wholly left out of the legislative consideration except in certain conditions. The construction of this statute given by the majority makes it mean that the widow shall have, in all cases where the indebtedness is not greater than one-half the value of the entire estate, a full one-half as dower, and that only in cases where the indebtedness is less than one-half of the value of the entire estate shall the collateral heirs receive any portion thereof. An illustration is given in the brief which shows the injustice of this construction. A. dies, leaving an estate worth \$50,000 and no debts. His wife takes \$25,000, and his collateral heirs take \$25,000. B. dies, leaving an estate worth \$100,000, and leaves \$50,000 in debts. B.'s widow takes the entire net value of this estate, or \$50,000, and the creditors take the other \$50,000, and the collateral heirs take nothing. Both estates have the same net value, and the widow, in one case, takes one-half of this net value, and in the other case the entire net value. If A. before his death should buy \$50,000 worth of property, and should owe the entire purchase price at his death, the transaction would result in giving his widow the entire net value of his estate. I think the Legislature intended no such result.

I think it less likely that this result would have been reached had the distribution of this estate been viewed

prospectively, instead of retrospectively. As a matter of fact, the widow, creditors and collateral heirs stood by for a long number of years, and wisely so, while an efficient administrator was collecting enough rents to pay the debts and preserve the real estate for the distributees. But not many estates are so administered, or can be. The statute contemplates an early closing of the administration, and to that end has reduced to one year the time within which claims may be probated against the estate after letters of administration have been issued. Act of May 28, 1907, page 1170, Acts 1907.

To correctly interpret this statute we must view it prospectively. We must have the perspective of the administrator who has just entered upon the discharge of his duties. This administrator would have had in view that the widow has certain specific statutory allowances. He would also have it in view that she took dower in specific property, both real and personal. *Johnson v. Johnson*, 92 Ark. 292; *Ex parte Grooms*, 102 Ark. 322. That this dower right vests in the widow immediately on the death of her husband, and descends to her heirs. *Barton v. Wilson*, 116 Ark. 400. And that no adjudication of a court is necessary to give her this right. *Kendall v. Crenshaw*, 116 Ark. 427; *Barton v. Wilson*, *supra*. And while, as said in *Arbaugh v. West*, *supra*, the widow does not take any property in severalty until it is assigned, still the estate itself vests in her immediately upon the husband's death.

It was not intended that the dower of the widow should be made to depend upon the solvency or insolvency of the estate. That fact may not be determined until the administration is completely closed. Her share depends upon the existence of debts, and the amount of them, whether the estate be solvent or insolvent. She has a third in any event, but the creditors, few or many, large or small, have the right to say that, where the widow is paid one dollar, they shall be paid two, and that this process shall continue until all the debts are paid; and then, if any balance remains, that sum is divided equally be-

tween the widow and the collateral heirs. These heirs get nothing until the debts are paid; but, when they are paid, and in the manner in which I think the statute provides that they shall be paid, they are entitled to one-half of the sum then remaining. The court below so construed the statute, and I think the decree in that respect should be affirmed. I, therefore, dissent from the opinion of the majority.

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LOUIS WERNER SAWMILL COMPANY v. DYER.

Opinion delivered December 3, 1917.

1. **LIMITATIONS—PERSONAL INJURY ACTION.**—In a personal injury action defendant in its answer said “the defendant specifically pleads the statute of limitations in case of recovery of plaintiff.” *Held*, the plea was sufficient under section 5, Act 175, session 1913, to raise the issue of limitations, and the use of the word “case” was a misprison, and would be treated as though the word “bar” has been used.
2. **LIMITATIONS—PERSONAL INJURY ACTION.**—Plaintiff’s action held barred by limitations, under section 5, Act 175, Acts of 1913.
3. **LIMITATIONS—VESTED RIGHT OF DEFENSE.**—A defendant has a vested right in the defense of the statute of limitations, of which he can not be deprived by subsequent legislation.
4. **INSTRUCTIONS—MUST BE VIEWED AS A WHOLE.**—The instructions given by the court must be taken as a whole, and as such the rulings of the court in passing upon the same must be consistent.
5. **APPEAL AND ERROR—INSTRUCTIONS—INSTRUCTION TREATED AS SPECIFIC OBJECTION.**—A prayer for an instruction is tantamount to a specific objection to some other instruction given by the court with which the instruction prayed for is in conflict, or which the instruction prayed for and refused was intended in lieu of, or as a modification of, or limitation, upon.

Appeal from Union Circuit Court; *Charles W. Smith*, Judge; reversed.

*Aylmer Flenniken*, for appellant.

1. The court erred in refusing to give instruction No. 3 for defendant on assumed risk. 97 Ark. 486; 81 *Id.* 343; 56 *Id.* 206; 96 *Id.* 387; 87 *Id.* 321.

2. Also in refusing No. 4, asked by defendant. The suit was barred. Acts 1913, No. 175. Limitation was pleaded.

3. It was error to give No. 3, asked by plaintiff; also No. 4. Plaintiff knew of the danger and risk and assumed it. No negligence of defendant was proven. 95 Ark. 291; 81 *Id.* 343; 77 *Id.* 367; 68 *Id.* 316; 48 *Id.* 346; 53 *Id.* 117; 77 *Id.* 367. No. 4 is also abstract. 37 *Id.* 580; 77 *Id.* 567. It ignores the assumption of risk. 97 Ark. 486.

*H. S. Powell*, for appellee.

1. Act No. 175, Acts 1913, does not apply. Besides limitation was not pleaded. 19 Ark. 16; 78 *Id.* 211; 80 *Id.* 181. The act is only applicable to suits brought under the act. 80 Ark. 221; 106 *Id.* 371.

2. The court erred in its instructions. Appellant having agreed to appellee's first instruction, can not complain of the refusal to give its fourth. 80 Ark. 180; 93 *Id.* 573. Limitation as well as assumed risk and contributory negligence must be pleaded. 105 Ark. 205-240; 89 *Id.* 522.

3. There was no error in refusing appellant's instruction No. 3. 107 Ark. 512; 122 *Id.* 227. Nor in giving appellee's requests 3, 4 and 8.

4. Act 364, volume 2, Acts 1917, page 1789, was in force when this suit was tried, and under it the limitation was three years.

#### STATEMENT OF FACTS.

The appellee was in the employ of the appellant as millwright, and on the 13th day of January, 1914, he was injured while doing certain repair work, consisting of the building of a chute under the log deck of the mill. Appellee was ordered by the mill foreman to construct the chute, and he informed the foreman that it was dangerous to work under the holes in the log deck of the mill while the mill was running because pieces of timber at any time might come through and fall on him. The foreman insisted that he go ahead and build the chute, and informed

appellee that he, the foreman, would go up on the deck and see that nothing fell through the holes while he was so engaged. Relying upon this promise, appellee went to work on the chute and while so engaged a heavy piece of timber drawn up by logs from the mill pond fell through one of the holes above the chute on which appellee was working, and struck him on the head, causing a severe and permanent injury.

On the 28th of February, 1916, the appellee instituted this suit against the appellant, alleging that he was injured through appellant's negligence, and asking for damages. The appellant answered, denying the allegations of the complaint, and setting up the defenses of assumed risk and contributory negligence, and further answering "the defendant specifically pleads the statute of limitations in case of recovery of plaintiff."

The appellee testified that he was injured on January 13, 1914, and further detailed the circumstances of his injury substantially as above set forth.

The cause was submitted to the jury upon eight separate prayers granted at the instance of the appellee and four prayers granted at the instance of the appellant. The record recites the following: "These were all the instructions given by the court requested by the plaintiff. After the court had passed on and given the above eight instructions requested by the plaintiff, and after the defendant had saved exceptions as shown to plaintiff's instructions numbered 3, 4 and 8, the defendant then requested the court to give the following instructions numbered from 1 to 6 inclusive, the action of the court thereon and exceptions of the defendant being as follows, towit." Then follows instruction numbered 1, given at the instance of the appellee, as follows: "You are instructed that if you find, from a preponderance of the evidence, that the plaintiff was injured on account of the negligence of the defendant's foreman in permitting a piece of timber to fall from the mill deck and strike him, while under the instruction of the said foreman he was engaged in doing work under the deck, and was not due to his own con-

tributory negligence, or on account of any risk assumed by him, then it will be your duty to return a verdict for the plaintiff."

Then follows the other seven instructions given at the appellee's request. The record shows that no objection was offered to the giving of appellee's instruction No. 1. After appellee's prayers for instructions were granted by the court, the appellant presented, among others, the following prayer for instruction numbered 4, to-wit:

"You are instructed that if you find from a preponderance of the evidence in this case that the alleged injury complained of occurred more than two years prior to the filing of this suit, which was filed on the 28th day of February, 1916, then you should find for the defendant."

The court refused to grant this prayer, to which appellant duly excepted, and made this ruling one of the grounds of its motion for a new trial.

The verdict and judgment were in favor of the appellee and appellant duly prosecutes this appeal.

WOOD, J., (after stating the facts). The appellee's cause of action was barred by the statute of limitations.

(1-2) Section 5 of Act 175 of the Acts of 1913 is as follows: "That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." This is a part of the Employers' Liability Act, the first section of which provides: "That every corporation, except while engaged in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such corporation," etc.

The appellee contends that the statute of limitations was not pleaded, but the language above quoted from the answer was sufficient to advise the appellee that the appellant was relying upon the two years statute of limitations in bar of appellee's cause of action. True the word "case" is used instead of the word "bar," but the con-



text shows that the use of the word "case" was a mere clerical misprision, and the plea should be read by substituting the word which the context shows was manifestly intended. The plea was sufficient on demurrer, and if appellee desired that the same be made more specific he should have called attention thereto by motion. The plea was sufficient to admit proof to show that the action was barred by limitations. The complaint itself showed that the suit was instituted on February 28, 1916, and the undisputed evidence of the appellee showed that his injury occurred on the 13th day of January, 1914. Therefore, the evidence shows that more than two years had elapsed between the time of the alleged injury and the institution of the suit. This proof was sufficient to warrant the appellant in presenting a prayer for instruction based upon the provision of the statute of limitations contained in the Employers' Liability Act. The allegations of the complaint and the undisputed testimony were sufficient to show that the appellant corporation was not engaged in interstate commerce at the time the appellee received his injury, and the very language in which appellant's prayer for instruction is couched also shows that the appellant was relying upon the limitation contained in the above statute, because that is the only statute which prescribes a limitation of two years after the accrual of a cause of action for the bringing of such suits. It is impossible to escape the conclusion, when the record as a whole is considered, that the appellee based his cause of action upon the Employers' Liability Act, and that the appellant invoked and was relying upon the statute of limitations contained in that act as a bar to the appellee's right to sue.

(3) The appellee further contends that he had a right to maintain the suit under the provisions of act 364 of the Acts of 1917, volume 2, page 1789, the first section of which is as follows: "That section 5 of Act 175 of the Acts of 1913 be amended to read as follows: "That no action shall be maintained under this act unless commenced within three years from the date the cause of

action accrued, and this shall apply to all causes of action heretofore accrued if suit has been filed or shall be filed within three years from the date the cause of action accrued."

But this court, in the early case of *Couch v. McKee*, 6 Ark. 484, held that one could have a vested right in the defense of the statute of limitations of which he could not be deprived by subsequent legislation, and this holding was reiterated in the recent case of *Rhodes v. Cannon*, 112 Ark. 6.

At the time of the passage of the act of 1917, *supra*, appellant's defense to appellee's cause of action, then pending, was complete. The bar of the statute of limitations under which that action was brought, and which was set up and pleaded as a defense to that action, was then a vested right of which appellant could not be deprived by the subsequent statute.

(4-5) Appellee further contends that inasmuch as the appellant made no objection to the ruling of the court in granting appellee's prayer numbered 1, that it waived its right to raise, and is estopped from raising the objection to the ruling of the court in refusing its prayer numbered 4. But the instructions must be taken as a whole, and as such the rulings of the court in passing upon the same must be consistent. This court has held that a prayer for an instruction is tantamount to a specific objection to some other instructions given by the court with which the instruction prayed for is in conflict or which the instruction prayed for and refused was intended in lieu of or as a modification of or limitation upon. See *Henry Wrape Co. v. Barrentine*, 129 Ark. 111, 195 S. W. 27; also *Chicago Mill & Lumber Co. v. Johnson*, 104 Ark. 67.

Under this rule, appellant's prayer for instruction No. 4 must be taken as a specific objection to the ruling of the court in granting appellee's prayer No. 1, unless the court also embodied in its charge appellant's prayer No. 4. Appellant's prayer No. 4 must be taken as a request on the part of the appellant that the same be

granted and considered by the jury in connection with appellee's prayer No. 1.

Therefore, for the error in refusing to grant appellant's prayer No. 4, the judgment is reversed, and the cause will be dismissed.

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DICKINSON, RECEIVER, AND CHICAGO, ROCK ISLAND & PACIFIC  
RAILWAY COMPANY v. ATKINS.

Opinion delivered January 28, 1918.

1. **MASTER AND SERVANT—RAILROAD—TENDER OF WAGES DUE—DE MINIMIS NON CURAT LEX.**—A railroad company discharged an employee, appellee, on January 15 and tendered to him wages due in the sum of \$25.14, without tendering interest on the same which amounted to between three and a half and four cents. *Held*, the appellee could not recover any penalty for a failure to make such tender of interest, for the reason that the amount of the interest was so small as to come within the maxim *de minimis non curat lex*.
2. **MASTER AND SERVANT—RAILROAD—WAGES DUE—TENDER—REFUSAL TO ACCEPT—DUTY TO STATE WHY—INTEREST.**—Where a railway employee, who has been discharged, refuses to accept a tender of the wages due him, on the ground that interest thereon is not included, he must state his reason for declining the tender, before any right to recover a penalty will accrue.
3. **MASTER AND SERVANT—WAGES DUE—USELESS TENDER.**—A tender of wages is not required, where it is evident that the tender will not be accepted.
4. **MASTER AND SERVANT—DISCHARGE WITHOUT CAUSE—PENALTY.**—Kirby's Digest, § 6651, provides that where a servant has a contract for employment for a definite period of time and is discharged without cause, that he may recover a certain penalty, and have an action also for any damages sustained by reason of the wrongful discharge. *Held*, this statute does not create an independent cause of action, *ex delicto*, sounding in tort growing out of a discharge without cause, but the statute gives to the discharged employee, in addition to the penalty prescribed in Kirby's Digest, § 6649, a right to recover such damages as he may have sustained by reason of discharging him without cause before his contract had expired. The measure of damages in such cases is the amount of wages that the servant would have earned had he been permitted to work for the full period of his contract, less

such sums as he might, by reasonable diligence, have earned in a similar business, making allowance for the expense of obtaining other employment.

Appeal from Prairie Circuit Court, Northern District; *T. C. Trimble*, Judge; modified and affirmed.

*Thos. S. Buzbee and Geo. B. Pugh*, for appellant.

1. On January 31 plaintiff was tendered a check for his wages. He did not demand interest, nor refuse the check because a few cents interest was not included. The tender of wages without interest stopped the running of the penalty, and plaintiff's recovery was limited to \$52.71, his wages, and \$27.36 penalty. Kirby & Castle's Digest, § 5464; 64 Ark. 83; 96 *Id.* 634; 93 *Id.* 497; 76 *Id.* 326. The court erred in giving plaintiff's instructions 1 and 7 and in refusing defendant's Nos. 7 and 8.

2. Plaintiff was entitled to recover nothing on his second count. Kirby & Castle's Digest, § 5466; 9 Ark. 394; 19 *Id.* 671; 57 *Id.* 370; 58 *Id.* 617; 39 *Id.* 280.

*Emmet Vaughan*, for appellee.

1. No sufficient tender was made as no interest (however little) was included. 92 Ark. 425, 430. A tender must include principal and interest with costs. 28 So. 217; 68 N. Y. S. 833; 73 *Id.* 153; 86 *Id.* 732; 65 N. E. 577.

2. Under section 6651, Kirby's Digest, plaintiff was entitled to recover on the second count any damages, over and above the penalty, he may have sustained by reason of his wrongful discharge. The corporation was liable for the torts of its agent. 118 U. S. 256; 1 Black, 39, 50; 147 U. S. 101-109; 14 Howard, 468; 121 U. S. 637; 5 Thompson on Corp. 5523-4-5; 13 Cyc. 117; 29 S. W. 743; 67 Pac. 99.

3. The case was submitted upon proper instructions and the evidence is sufficient.

#### STATEMENT OF FACTS.

The appellee was an employee of the Chicago, Rock Island & Pacific Railway Company on a salary of \$53 per month. He was discharged by the company on the 15th

of January. At that time the company owed him the sum of \$25.14, which he then demanded of his timekeeper, who was appellants' agent. Appellee told the agent to have the check for the amount due him sent to Des Arc. On the 31st day of January appellants tendered to the appellee the sum of \$25.14, the amount that was due him on the 15th, the date of his discharge. Appellants did not tender the appellee any interest on this amount from the time same was due up to the time the tender was made. The amount tendered was refused. The appellee demanded that in addition to the \$25.14 due him at the time of his discharge that he receive the wages at the rate of \$53 per month from the date of his discharge to the time when the tender was made, which being refused, he instituted this suit against appellants and prayed judgment for the sum of \$25.14, the wages actually earned and due him at the time he was discharged, and also for wages at the rate of \$53 per month until final settlement.

There is no testimony to show that at the time the tender of the \$25.14 was made to appellee he demanded of appellant interest on this sum to that date, and there is no testimony to show that he would have accepted the tender if it had included the interest to that time. On the contrary, the testimony tends to show that even if the interest had been included in the amount tendered he would still have refused to accept the tender for the reason that he claimed that his wages should have continued up to the time of the tender at the rate of \$53 per month, and, besides, his testimony tends to show that he would not have accepted the tender for the further reason that he contended that the company's failure to pay the amount of wages due him, within seven days after his discharge and his demand for same, had incurred a penalty, which, at the date of the tender of the check amounted to \$27.36.

The appellee testified that he called for his check about four days after he was discharged, and then went back in about seven days and the agent said it had not come. The appellant's station agent testified that the appellee came in on the night of the 20th, after his dis-

charge on the 15th, and asked about his check; that witness told him that if he would come around "tomorrow morning" he would give him the money. Appellee said "all right," but did not show up any more until the 31st, when the check for the amount of wages was tendered appellee and he refused it.

For an additional cause of action the appellee set up in the second count of his complaint that he was discharged by the receiver without cause and "upon a trumped-up charge of having misappropriated a pearl shipped to the station where the appellee was employed, through the American Express Company, which company maintained an office in the office of the railway company;" that he believed the charge was framed by the agent of the railway company in order to secure his discharge and make way for the employment of a relative of the local agent; that by reason of the discharge his credit had been destroyed with the railway company and the express company, and with the bonding company which executed his bond; that his standing in the community for honesty and integrity had been impaired, greatly to his damage, in the sum of \$2,500, for which he also prayed judgment.

The appellants denied specifically the allegations of the second count of the complaint, and stated that if their agent made any false statements, or any statements, in discharging appellee, impugning his honesty and integrity, that the agent did so without the consent of the appellants, and that if there were any such statements by the agent they were not in the line of his duty.

The testimony on behalf of the appellee on the second count of his complaint was to the effect that prior to his discharge he had never heard of any complaint being made as to his inefficiency and incompetency as an employee. He was short during the first week of his employment in the sum of \$18, which appellee refunded. He was also short another time, and while he was sick the agent communicated the fact of appellee's shortage to appellee's uncle, who refunded the money. Appellee was

not short after that until he was taken sick and went to Little Rock, and when he came back he paid the shortage. Appellee made a bond before he went to work for the appellants. While he was working for the appellants a pearl came through the express company to the address of A. L. Irwin. Appellee signed for the pearl, put it in the pigeon hole of his desk where he kept small packages all the time. It was appellee's duty to deliver the pearl to Irwin when he came for it, but the next morning after the package containing the pearl came in it could not be found. The agent, Mr. Turner, wanted to know if appellee was sure that he put it in the pigeon hole and appellee told him that he was. Appellee thought perhaps it had been misplaced, but he turned the office upside down at least a half dozen times and could not find it. The agent said that somebody got it. The pearl was lost on Friday. Appellee was discharged on Monday night, and he learned that the pearl was found Tuesday night following. The agent, Mr. Turner, found it across the room from appellee's desk, down on the floor about a foot from the corner of the safe.

A day or two after appellee was discharged Miss Ruth, the agent's relative, took appellee's place. Appellee had nothing to do with misplacing the pearl. He placed it where he usually put such packages. Appellee was greatly worried about it; everybody was talking about it. It was a source of embarrassment, mortification and chagrin to appellee. He did not sleep for about three nights. The agent sent a telegram to the superintendent of the express company at El Reno, saying that the pearl had been lost by the appellee and telling him that appellee was bonded in the American Surety Company, and that appellee was not able to pay for the pearl. In answer to this telegram, the superintendent telegraphed: "Such negligence must not be tolerated. Atkins must be removed at once. Will take it up with the bonding company," or something to that effect. The pearl was valued at \$300. The agent told appellee several times to look after the express matter. The pearl came in on the noon

train and appellee stuck it in the pigeon hole and never thought of it until he came in to get it the next morning. He never mentioned it to the agent, Mr. Turner. Turner never accused appellee of stealing the pearl, and pointed out the place where he found it, but it could not have been there when he was looking for it. The room had been swept a dozen times, and it would have been swept out if it had been in that position. Turner was appellee's superior and everything appellee did was under his directions.

The testimony on behalf of appellants on the issue raised in the second count tended to show that appellants discharged the appellee on the grounds of general incompetency and carelessness, which extended over a considerable period of time; in fact, all the time that he was employed. Their agent did not charge him with any dishonesty; did not accuse him of misappropriating the pearl, and they would not have discharged him for any one of the mistakes that he made.

The testimony of the agent, Turner, enumerates several items showing that the appellee was short in his accounts at different times before the pearl was lost. The witness did not know anything about the pearl being lost until it was called for by Irwin's agent. The appellee had not said anything to him about it. Appellee had signed for the pearl, and when the matter came up witness asked appellee what he did with it and he replied that he laid it "right there on the corner of the desk." He afterwards said that he shoved it in a pigeon hole. They both searched for it, and witness found it on Monday night lying right up under the safe, up against the wheel of the safe. Witness had not looked there for it before but had looked every place where he thought it could be. In sweeping out they should sweep under the safe; sometimes they do.

The above are substantially the facts. Upon the first count of the complaint the court instructed the jury, in effect, that if they found from the evidence that appellee was discharged by appellants, and that he demanded



his wages earned up to the time of his discharge from the agent of appellants who was the keeper of his time, or that a valid check therefor be sent to some station where a regular agent of appellants was kept within seven days, and that payment was refused, and appellants failed to pay said wages within the time allowed by law for the payment thereof without a penalty, that plaintiff would be entitled to recover, in addition to the wages already earned, other wages at the same rate from the date of his discharge until the amount due him was paid or judgment rendered for the same, unless the jury should find from the evidence that appellants had tendered to appellee the wages actually earned, with legal interest, in which event the appellee would not be entitled to recover a penalty after the tender. Further, that the wages due the appellee upon the date of his discharge were due to be paid to him within seven days thereafter, and that interest at the legal rate began to run from that time, and that a tender of the wages after that time which did not include the interest accumulated up to the time of the tender, was not a full tender and would not stop the running of the penalty.

Upon the second count of the complaint, the court, in effect, instructed the jury that a servant whose employment was for a definite period of time and who was discharged without cause before the expiration of such time might, in addition to the penalty prescribed by the act, have an action against his employers for any damages he might have sustained by reason of his wrongful discharge, and that if they found from the evidence that appellee was employed by appellants for a definite period of time, and that he was discharged without cause before the expiration of such time, then they should find for the appellee in such a sum as the jury might find he was entitled to recover from the evidence for any damages that he may have sustained.

The court further instructed the jury that a corporation was liable for punitive damages for the wilful acts of its agents or servants acting within the scope of their

employment, although the particular act complained of was not authorized nor ratified by appellants, and that if they found that the appellee was discharged upon a trumped-up charge lodged against him by the agent of the appellant which was wilfully done and which was within the scope of his employment, and that such charge was false, that the appellants would be liable and the jury should find for the appellee in such sum as they might find from the evidence that he was entitled to in addition to the compensatory damages, if any, and in addition to such sum as they might find from the evidence, if any, that he was entitled to recover on account of unpaid wages and penalty.

The appellant objected to these instructions, and asked the court to instruct the jury on the first count of the complaint that the appellee was not entitled to recover anything in the way of penalty for not paying the wages due him within seven days after he was discharged, and that he was not entitled to recover anything on the second count of the complaint.

Appellants also asked the court to instruct the jury that if a valid check was tendered by the appellant to the appellee for the amount of wages due him at the time of his discharge, that such tender stopped the running of the penalty in the future, even though no interest on the amount due the appellee at the time he was discharged was included in the check, unless the appellee declined such check on the ground that interest was not included. And, further, that the appellants did not have to tender the appellee the wages due him and the penalty up to that time to stop the running of the penalty in the future; that if the appellee declined to accept the check on the ground that the penalty was not included along with the wages, and said nothing about declining the check because interest was not included, then such tender stopped the running of the penalty.

The appellants further requested the court to instruct the jury, on the second count, that the appellee's measure of damages for wrongful discharge would be the differ-

ence between what he would have earned had he been permitted to continue in appellants' employment until his contract expired and what he was able to earn during such time in some other employment which he obtained or could have obtained, if any, by asking for it.

Appellants also asked specific instructions to the effect that under the pleadings and the evidence they were not liable to the appellee in the way of exemplary or punitive damages for anything done or said by their agent, Turner, in connection with discharging the appellee.

The jury returned a verdict in favor of the appellee on the first count for the amount of his salary due January 15, 1917, \$25.14, and for interest on same from January 15, 1917, to March 7, 1917, twenty-one cents, and for salary at the rate of \$53 per month from January 15, 1917, to March 7, 1917, \$91.46, making a total of \$116.81. On the second count they returned a verdict in favor of the appellee for \$500. The case is here on appeal from a judgment in favor of the appellee against the appellant for the above amounts.

WOOD, J., (after stating the facts). When appellants discharged the appellee on the 15th day of January there was due him the sum of \$25.14. On the 31st day of January thereafter the appellants tendered to the appellee this sum, without including the amount of the interest thereon due to that date. The amount of the interest on the date of the tender, excluding the seven days allowed by law for the appellants to have made payment, at the rate of 6 per cent. per annum, would be between three and one-half and four cents.

(1) For the purpose of this case it may be conceded, without deciding the question, that in order to stop the running of the penalty it was necessary for the appellants to tender to appellee, not only the wages that were due him at the time of his discharge, but also the interest that had accrued on the amount of such wages from the time of his discharge to the date that the tender was made. Nevertheless, even if such were the law, under the undis-

puted facts of this record the appellee was not entitled to recover any penalty for a failure to make such tender of interest for the reason that the amount of the interest was so small as to come within the maxim *de minimis non curat lex*. Broom's Legal Maxims, page 118. The amount of interest was so small that the law will not take notice thereof, and the tender on January 31 of the amount of the wages that was due appellee on the 15th of January prevented the accrual of any penalty after the date of the tender. *St. L., I. M. & S. Ry. Co. v. Paul*, 64 Ark. 83; *St. L., I. M. & S. Ry. Co. v. Bryant*, 92 Ark. 425.

(2) Conceding that the law requires not only the wages past due, but also the interest due up to the date of the tender, in order to stop the running of the penalty, the undisputed facts of this record make it manifest that if the appellee had made it known to the appellants that he was refusing the amount tendered because the interest was not included, that appellants would have at once included such interest. If the appellee intended to predicate his right to a penalty upon the ground that the appellants had not tendered him the interest as well as the principal at the time the tender was made, then good faith on his part required that he notify appellants of that fact. This is especially true where the item of interest was so insignificant as to make it manifest that the appellants would have included the same if their attention had been drawn to the appellee's insistence in that respect. *Hall v. C., R. I. & P. Ry. Co.*, 96 Ark. 634.

(3) Furthermore, the pleadings and the undisputed evidence show that the appellee would not have accepted the tender even if it had included the trifling sum of three or four cents interest that was due, in addition to the principal, on the date the tender was made. The only reasonable conclusion that can be drawn from the pleadings and the proof is that appellee refused the tender, not because it did not include interest due, but because he claimed that the appellants were due him an additional sum for wages as a penalty that had already accrued at

the time the tender was made, which additional sums were not embraced in the tender.

A tender is not required where it is evident that it will not be accepted. The law never requires "a vain thing to be done." *Read's Drug Store v. Hessig-Ellis Drug Co.*, 93 Ark. 497; *Thompson v. Baxter*, 76 Ark. 326.

Therefore, the court erred in its instructions telling the jury that the penalty would run until the date of the judgment, unless the appellants had tendered the wages actually earned with legal interest.

The jury might have found, under the pleadings and the evidence, that the appellee was entitled to recover the amount of his wages, \$25.14, and interest thereon to the day of the trial, and \$27.36 penalty up to the date the tender of his wages was made, making a total sum of \$52.71.

The judgment of the trial court will be modified and reduced to this sum, and as so modified affirmed, but without costs.

II. The appellee predicates his right to recover on the second count on the provisions of section 6651 of Kirby's Digest, as follows: "Any such servant or employee whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time, may, in addition to the penalties prescribed by this act, have an action against any such employer for any damage he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty."

(4) The purpose of this statute was not to create an independent cause of action, *ex delicto*, sounding in damages as for a tort growing out of a discharge without cause, but the design of the Legislature was to give to the employee who was discharged without cause the right to recover, in addition to the penalty prescribed by section 6649 for a failure to pay the wages due the servant or employee at the time of his discharge without cause, such damages as he may have sustained by reason of discharging him without cause before his contract had expired,

where he was employed for a definite period of time. For instance, if a servant or employee, under the statute, was employed for a definite period of time, say six months or a year, and at the end of one month such servant should be discharged without cause, then, in such case, if the wages due at the time of such discharge were not paid according to the terms prescribed by such section the railway company or corporation would incur the penalties therein prescribed for a failure to pay the wages according to the provisions of that section, and in addition to the penalty thus provided the servant or employee, if his contract was for a definite period of time, and if he were discharged without cause, would have the right to recover such damages as he had sustained by reason of the breach of his contract in discharging him without cause before his contract had expired. The measure of damages in such case would be the amount of wages that he would have earned had he been permitted to work for the full period of his contract, less such sums as he might, by reasonable diligence, have earned in a similar business, making allowance for the expense of obtaining other employment. *Van Winkle v. Satterfield*, 58 Ark. 617.

The appellee was allowed to recover upon his second count, under an erroneous construction of the law and erroneous instructions, the sum of \$500.

The pleadings and the proof do not warrant any recovery on this count, and the judgment on this count is reversed and the cause of action as set forth in the second count is dismissed.

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### SIMPSON v. MONTGOMERY COUNTY BANK.

Opinion delivered January 28, 1918.

#### APPEAL AND ERROR—FINDING OF CHANCELLOR—CONSIDERATION FOR

NOTE.—In an action on a note and the foreclosure of a mortgage given to secure it, the defendant pleaded usury. *Held*, the finding of the chancellor that the note was not usurious, would not be disturbed on appeal.

Appeal from Montgomery Chancery Court; *J. P. Henderson*, Chancellor; affirmed.

*C. H. Herndon*, for appellant.

The note was void for usury. 41 Ark. 331; 83 *Id.* 31, etc.

*Gibson Witt*, for appellee; *Earl Witt*, of counsel.

There was no usury. 35 Ark. 217; 55 *Id.* 143; 56 *Id.* 334; 67 *Id.* 426; 99 *Id.* 626.

The chancellor so found and his findings are not against the preponderance of the evidence.

HART, J. The Montgomery County Bank instituted this action in the chancery court against John T. Simpson and Mattie Simpson, to obtain judgment on a note for \$126.25 and to foreclose a mortgage on certain real estate to secure the same. The defendants interposed the defense of usury. The material facts are as follows:

The Montgomery County Bank obtained a judgment against John T. Simpson before a justice of the peace and a transcript of the judgment was filed with the circuit clerk. An execution was issued and the land in controversy was sold to G. Cox, who was president of the bank, and who purchased the land for the bank in satisfaction of its judgment. Cox instituted an action in ejectment against Simpson for the land. Simpson defended the suit on the ground that the land belonged to Mattie J. Simpson, his wife. The note sued on was given by Simpson to H. A. King to effect a settlement of the ejectment suit. The note was payable to H. A. King, who was the attorney for Simpson, and King transferred the note to the bank.

According to the testimony of Simpson, \$75 of the note was for the settlement of the claim of the bank against him; \$25 was for the settlement of his attorney's fee to King; \$1.50 for the recording of the mortgage on the land given to secure the note, and \$25 as interest on the note or as bonus for the loan. The note was executed upon a blank form of the bank and bore interest at the rate of 10 per cent. per annum from date until paid.

According to the testimony of L. L. Beavers, the cashier of the bank, the note was purchased before maturity by the bank in the usual course of business from H. A. King. He was asked the following: "You knew the circumstances under which Mr. King received this note?" He answered, "Yes. It was given to compromise this lawsuit, and to secure his attorney's fee." He also testified that King was dead.

The chancellor found that the note was given in compromise of the ejectment suit and for the payment of the attorney's fee owed by Simpson to King. A decree was accordingly entered for the amount of the note sued on and for a foreclosure of the mortgage given to secure it. The defendant has appealed.

According to the settled rule of this court the findings of fact made by a chancellor will not be disturbed on appeal unless they are against a preponderance of the evidence.

According to the testimony of the cashier of the bank, the note in question was made up of \$75 which went to the payment of the compromise between the bank and Simpson, and \$50 for the payment of the attorney's fees owed by Simpson to H. A. King. The remaining \$1.50 was the fee for recording the mortgage.

It is true the testimony of the cashier was contradicted by that of Simpson but, tested by the rule above announced, it can not be said that the finding of the chancellor is against the preponderance of the evidence.

Therefore the decree will be affirmed.

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MOORE v. THOMAS.

Opinion delivered January 28, 1918.

1. **APPEAL AND ERROR—CREDIBILITY OF WITNESSES.**—The jury is the sole judge of the credibility of witnesses and the weight to be attached to their testimony.
2. **APPEAL AND ERROR—FINALITY OF VERDICT.**—A verdict will not be disturbed on appeal if supported by any legally substantial evidence.



3. **APPEAL AND ERROR—INCOMPETENT TESTIMONY—EXCEPTIONS.**—An objection alone, to the admission of incompetent testimony, is not sufficient. An exception must be saved.

Appeal from Miller Circuit Court; *Geo. R. Haynie*, Judge; affirmed.

*Webber & Webber*, for appellant.

1. It was error to admit certain checks and papers in evidence on which appellant's signature appeared. This was prejudicial. 32 Ark. 337; 62 L. R. A. 836, and note; 2 Elliott on Ev., par. 1105; 6 Enc. of Ev. 410.

2. It was error to admit a letter purported to have been written by appellant. Appellee's testimony is very unsatisfactory. The first note was a forgery and the signature to the second promise was obtained by fraud. There was absolutely no evidence to sustain the verdict.

*John N. Cook*, for appellee.

1. Appellee's testimony is consistent and the evidence supports the verdict. 126 Ark. 306; 113 *Id.* 403.

2. No exceptions were saved to the admissibility of the checks, papers, letter, etc. 126 Ark. 305.

**HUMPHREYS, J.** Appellee brought suit before a justice of the peace in Garland township, Miller county, Arkansas, against appellant to recover a balance due upon a note in the sum of \$460, purported to have been signed by appellant on January 5, 1915, for borrowed money.

Appellant defended against the note on the ground that it was a forgery.

Appellee obtained judgment against appellant in the magistrate's court, from which an appeal was taken to the circuit court of Miller county and the cause was there tried upon the same issue and a verdict and judgment rendered in favor of appellee for \$222.90.

Proper steps were taken and an appeal has been prosecuted to this court.

Appellee testified, in substance, that appellant owed her \$60 and that she had \$400 in cash that she had obtained from her father's estate by gift from her step-

mother; that by appointment she met appellant at the Crown Drug Store in Texarkana, Arkansas, where she handed him the \$400 in money and received in exchange a promissory note for \$460 which had already been filled out and signed; that he had previously arranged with her for this loan, that the body of the note was written in pencil and the signature in ink, and that she did not know who had prepared the body of the note; that it then occurred to her that she might need the money before the maturity of the note, and asked appellant for a demand note, which he agreed to give her; that on the same day, at the Miller County Bank & Trust Company, she wrote upon a deposit slip as follows: "I promise to pay Mollie D. Thomas \$460 at 10 per cent. per annum," which promise was signed by him; that she obtained the money from her stepmother a few days before she loaned it to appellant; that when he executed the last promise he did not request her to return the original promissory note upon which she brought suit; that a short time after the execution of the note appellant endorsed her husband's notes amounting to \$237.10, for which she gave appellant credit on her note.

Mary S. McCain gave testimony in corroboration of testimony given by appellee to the effect that she had given appellee \$400 in money in December, 1913, which she had received, as widow, from the estate of T. J. McCain, deceased; that appellee was a delicate child and that she had learned to love her as much as if she had been her own child.

Appellee's evidence was also corroborated by the testimony of D. L. Dillard to the effect that, as administrator of the estate of T. J. McCain, deceased, he had paid Mary S. McCain, widow, \$450 in cash in addition to other property which had been divided between the heirs prior to that time.

There was a conflict between the direct evidence of appellee and her stepmother, Mary S. McCain, as to the date she received the money, but appellee, in rebuttal, testified that her stepmother was old and forgetful, and

while she testified the money was given to her in December, 1913, it was, in fact, given to her in December, 1914. This latter statement reconciled the conflict in the testimony on that point.

Appellant testified that the first note was a complete forgery and that his signature to the demand note was obtained on a blank deposit slip by a simple request for his signature; that the promise written above his signature was written after he had signed it and without his consent or permission; that he had never borrowed any money from her and owed her nothing on the note.

Facts and circumstances were detailed by witnesses Wheeler, Booker and Mrs. Fox tending to support appellant in his contention that his signature to the first note was a forgery and that his signature to the second promise was obtained on the blank bank deposit slip in the manner testified to by him.

A letter was introduced in evidence, over the objection of appellant, written by appellant to appellee for the purpose of comparing his signature on the letter with the signature on the first promissory note. No exception to this evidence was saved by appellant. Checks and other papers, signed by appellant, were offered for the same purpose, and the court ruled that they were admissible. Appellant objected and excepted but the bill of exceptions fails to show that the checks and papers were introduced and read to the jury.

(1) It is insisted by appellant that the verdict of the jury is against the weight of the evidence and that for that reason the judgment should be reversed. It is said that appellee's evidence is not only contradictory but it is in conflict with the evidence of all the other witnesses on various points. This court is committed to the doctrine that the jury are the sole judges of the credibility of the witnesses and the weight to be attached to their testimony. *Coats v. State*, 101 Ark. 51; *Rhea v. State*, 104 Ark. 162.

(2) There is substantial evidence in the record in support of the verdict and judgment. It has been said by this court in many cases that it will not disturb a ver-

dict on appeal if supported by any legal, substantial evidence. *Brotherhood of L. F. & E. v. Cravens*, 113 Ark. 400, and cases cited therein in support of this doctrine, also *Jones v. Hunter*, 126 Ark. 306.

(3) We can not consider the alleged error of the trial court in holding that the checks and other papers containing the signature of appellant were admissible for the reason that the bill of exceptions fails to show that the checks and papers were introduced in evidence. Nor can we consider the alleged error in the admission of the letter for the purpose of comparing the signature of appellant on the letter with the signature on the promissory note, for the reason that no exception was saved by appellant to the introduction of the letter. An objection alone is not sufficient. It is also necessary to save an exception. *Jones v. Hunter*, 126 Ark. 305.

No error appearing in the record, the judgment is affirmed.

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WEBER IMPLEMENT & AUTOMOBILE COMPANY v. PEARSON.

Opinion delivered December 3, 1917.

1. **MECHANIC'S LIENS—REPAIR MAN—CONDITIONAL VENDOR—AUTOMOBILE.**—A repair man who performs labor and does repairs upon an automobile has a lien for his labor which takes precedence over the rights of a conditional vendor.
2. **MECHANIC'S LIENS—REPAIRS ON SEVERAL AUTOMOBILES—ONE TRANSACTION.**—Under a contract to keep automobiles in repair, repairs made and labor done upon several cars belonging to one owner, done from time to time, will be regarded as done in one transaction.
3. **MECHANIC'S LIENS—AUTOMOBILE REPAIRS—PUTTING ON CASINGS.**—The placing of tire casings upon the wheels of an automobile does not come within the meaning of the statute allowing wheelwrights a lien for labor done and materials furnished by them.

Appeal from Pulaski Circuit Court, Third Division;  
*G. W. Hendricks*, Judge; reversed.

*Manning, Emerson & Donham*, for appellant.

1. The act under which the lien is sought does not cover that class of supplies sold by appellee. Kirby's Digest, § § 5013-14; 127 Ark. 433.

2. Appellee is not entitled to a lien for articles sold more than ninety days before filing his claim. 27 Cyc. 144.

3. If entitled to a lien at all, it should only have been on each car for the specific articles furnished for each car.

4. A lien could not be created on the cars by Aven as he did not own the cars. 34 Pac. 959; 50 N. H. 82; 19 Pick. 228; 54 Pac. 72; 56 *Id.* 339; 130 *Id.* 165; 4 S. W. 494; 19 *Id.* 909. The case in 103 Ark. 142 does not settle the question here. See also 56 Ark. 380; 3 R. C. L. 55; 17 *Id.* § 3.

*Geo. A. McConnell*, for appellee.

1. Appellee was entitled to a lien on the cars. 182 S. W. 759; 103 Ark. 142.

2. Appellee was entitled to a lien for all articles furnished except those excluded by the court. 91 Ark. 465; 56 *Id.* 544; 91 *Id.* 108; 63 *Id.* 367; 90 *Id.* 340.

3. Appellee was entitled to a lien on all the cars without showing on which car any specific material was used. 54 Ark. 93; 129 Ark. 58.

4. Appellee's lien was superior to that of the appellant. 82 Ark. 9; 100 *Id.* 403; 107 *Id.* 337-340; 67 So. 659; 56 Ark. 456; 122 *Id.* 464; 30 Am. Rep. 425; 149 N. W. 654; 37 Ark. 206; 121 Cal. 8; 43 L. R. A. 524; 3 R. C. L. 133.

#### STATEMENT OF FACTS.

Appellee sued W. R. Aven, Sr., and W. R. Aven, Jr., for the sum of \$364.51 for materials furnished and labor performed on three Mitchell touring cars, and asked that a lien be declared in his favor on said cars for said sum of money.

Appellant, Weber Implement & Automobile Company, filed an interplea in the cause in which it alleged that it was the owner of the cars, under the terms of the conditional sale. The facts are as follows:

In January, 1915, the Weber Implement & Automobile Company, sold three Special Six Mitchell automobiles with seven-passenger bodies to the Avens. The sale was made on a credit and the title was retained in the vendor until the purchase price should be paid. It was understood that the cars should be used in livery service and that payments on the purchase price should be made out of the earnings of the business. Appellee was engaged in Little Rock in the business of repairing automobiles and furnishing materials therefor. The Avens came to him and told him that they were engaged in operating the three Mitchell cars as taxicabs and made a contract with him to make the necessary repairs on them and to furnish the materials therefor. Late in the fall there was a time when the payments made by the Avens equaled their indebtedness to appellee. After that they purchased materials necessary for use in running the automobiles but the principal part of the account was eight casings which were installed by appellee upon the three automobiles above referred to. The evidence shows that the Avens were due appellee the amount sued for for repairs made on said automobiles and for materials furnished therefor. The evidence also shows that out of this amount the sum of \$334.16 was for placing eight casings on the three Mitchell cars and for other repairs made thereon.

The case was tried before the court sitting as a jury. The court rendered judgment in favor of appellee against the Avens for the amount sued for and declared a lien on the cars for the sum of \$334.16 in favor of appellee.

Other evidence will be referred to in the opinion. The case is here on appeal.

HART, J., (after stating the facts). (1) The Weber Implement & Automobile Company sold three Mitchell cars under a conditional sale contract to the

Avens, who agreed to pay for them in installments. It was agreed that the title to the cars should remain in the seller until the price was fully paid. It was also understood that the purchaser should have possession of the cars and use them in livery service and pay for them out of the earnings. In this way the sum of \$2,800 was paid but there was still due a considerable amount of the purchase money. The purchaser employed an automobile repair man in the city of Little Rock, to make repairs and furnish certain materials therefor to the extent of \$334.16. Under these circumstances the court held that there was implied authority from the seller to the purchaser to have the machines repaired and that the repair man had a lien on the machines which took precedence over the right of the conditional seller. The common law lien of an artisan on chattels can be asserted against a third person only when the property is retained in the actual and continuous possession of the person claiming the lien. Hence in testing the right of the repair man to a lien in the present case we must look to our statutes on the subject.

Section 1 of an act approved April 15, 1903, is as follows:

“Blacksmiths and wheelwrights who perform work or labor for any person, if unpaid for the same, shall have an absolute lien on the product of their labor and upon all wagons, carriages, farm implements and other articles repaired by them, for such work or labor and for all materials furnished by them and used in such product or repairs.” Act of 1903, page 259. /

This court has held that one who conducts a garage in which he repairs automobiles is a wheelwright within the meaning of the statute and that the statute gives him a lien on an automobile for repairs made thereon by him. *Shelton v. Little Rock Automobile Company*, 103 Ark. 142.

It is contended by counsel for appellant that in this case the court's attention was not directed to the question of whether a repair man should have a lien which should take precedence over the rights of the conditional vendor. While this question was not discussed in the opinion it

was necessarily involved. It must be admitted that there is a conflict in the authorities on this point, but the holding in the case just cited is in accord with a subsequent decision of this court bearing on the question.

In *Gardner v. First National Bank of De Queen*, 122 Ark. 464, the mortgagee allowed the mortgagor to keep certain horses and wagons which had been mortgaged to it and to use them in running his sawmill. Under these circumstances the court held that there was implied authority in the mortgagor to make necessary repairs and that under the statutes above quoted a blacksmith and wheelwright who had made certain repairs on the wagons and shod some of the horses had a lien superior to the lien of the mortgage. This rule is based on the fact that the labor and materials so furnished have enhanced the value of the property and have kept it in a necessary state of repair. Necessary repairs are for the betterment of the property, and under circumstances like the present case it will be presumed to have been the intention of the parties that the property should be kept in repair and the purchaser in possession will be deemed the agent of the conditional vendor to procure the repairs to be made. See, also, *J. A. Broom & Son v. S. S. Dale & Son* (Miss.) 67 So. 659, and cases cited.

(2) It is next contended that appellee could only have a lien on each car for the repairs placed on it and that inasmuch as the account sued on does not separate the items and show upon which car they should be placed, that appellee is not entitled to a lien. We can not agree with counsel for appellant in this contention under the facts in this case. This is not a case where different persons are asserting superior rights to the repair man. One corporation sold the three cars to the Avens. They knew that they were to be used in the livery business and that it would be necessary to make repairs on them from time to time to keep them in running order. Under these circumstances, the items furnished constitute only one transaction. They were furnished within the time prescribed by the statutes during which the lien could be filed



and appellee's claim for a lien is not barred by the statute of limitations.

(3) Finally it is insisted that the placing of the casings on the machines does not come within the meaning of the statute allowing wheelwrights a lien for labor done and materials furnished by them, and in this contention the majority of the court think that counsel for appellant are right.

Counsel for appellee to sustain the judgment relies upon the case of *Kansas City Automobile School Company v. Holcker-Elberg Mfg. Co.* (Kansas City Court of Appeals, Mo.), 182 S. W. 759. In that case a lien was allowed for furnishing and placing the body of an automobile upon its chassis. The word "chassis" means the frame work of the automobile, including wheels, tank, motor and general running gear. It was urged that the body of the automobile is an entirely separate article from its chassis and that there could be no lien. The court held that the making and fixing of the body to the chassis permanently necessarily involved some work on the latter. The court said that the work if well done added value to the chassis and made a complete machine. The majority of the court thinks this authority is rather against appellee than in his favor, for it requires a skilled mechanic to put the body of an automobile upon its chassis and it necessarily requires several persons to do it and tools especially prepared for that purpose.

The evidence in the present case shows that appellee took the tires off of the old rims, placed the inner tubes in new casings and then placed the casings on the rims of the wheels. The casing is then locked on the wheels with a device furnished for that purpose and the tire is inflated to its proper capacity. The casing that has been fitted to the rim is placed on the wheel of the car and fastened on by the locks on the wheels. Neither the casings nor the inner tubes are made by the repair man but necessarily are furnished to him by manufacturers. They are made of rubber and could not be manufactured by any ordinary automobile repair shop. Tools are furnished with an au-

tomobile so that the owner can take off and put on new tires at will. It does not require a skilled mechanic to do the work. When new casings or inner tubes are bought and placed upon the wheels by the repair man this work is usually a mere incident to the purchase of the casings and tubes. For these reasons the majority of the court is of the opinion that appellee should not be allowed a lien for the casings and inner tubes furnished.

The writer is of the contrary opinion. The statute gives the repair man a lien for labor and for all materials furnished by him. When the repair man fitted the casings or inner tubes on the machines they became a permanent part of them and were as necessary to the proper operation of the machines as any other part of them. In short, they became a permanent part of the machines, and the repair man should have a lien under the statute, not only for his work but for the materials furnished by him.

For the error in allowing a lien for the inner tubes and casings furnished, the judgment must be reversed and the cause remanded for a new trial.

HART, J., (on rehearing). Counsel in his motion for rehearing re-argues the question of whether or not Pearson acquired a lien for the placing of the casings on the machine and relies mainly upon a recent decision by the Supreme Court of Oregon in the case of *Courts v. Clark*, 164 Pac. 714, to support his contention. The statute under consideration in that case provides that every automobile repairer who has expended labor, skill and materials on any chattel at the request of its owner shall have a lien upon said chattel for the contract price of such expenditure notwithstanding the fact that the possession of such chattel has been surrendered to the owner thereof. Courts was engaged in selling and repairing automobile tires and casings. He had laborers who removed old tires and casings from motor vehicles and put on new ones. The court held that he was an automobile repairer within the meaning of the term as used in the statute and was entitled to the benefits of the lien given

by it although no separate charge was made for the labor of his employees for prying off the old tires and putting on the new ones. The court based its decision on the fact that the tires were essential to the completion of the vehicle for the purpose for which it was designed and that the laborers in prying off the old tires and putting on the new ones were restoring it to its former condition. The majority of the court does not agree with the reasoning of the court in that case. They think that the main business of Pearson in the present case was to sell tires, casings, etc., for motor vehicles and that the service of his employees in taking off the old tires or casings and putting on the new ones was merely an incident to his business and did not constitute him a wheelwright within the meaning of our statutes. They think that our statutes contemplate the performance of labor and skill on the vehicle as a prerequisite to the lien and where the parts are merely furnished and no charge is made for attaching them to the vehicle as in the present case, that the person furnishing the parts does not secure the benefits of a lien under the statute.

Therefore the motion for rehearing will be denied.

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THE J. R. WATKINS MEDICAL COMPANY v. MARTIN.

Opinion delivered December 17, 1917.

**FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—PROOF OF AUTHORITY.**—The authority of a foreign corporation to do business in this State may be proved by the certificate of authority issued to such corporation by the Secretary of State.

Appeal from Randolph Circuit Court; *J. B. Baker*, Judge; reversed.

*S. A. D. Eaton*, for appellant.

1. The contracts sued upon are similar to the one sued upon in 124 Ark. 539.

The appellant had complied with the laws of Arkansas, and this was shown by the certificate of the Secretary

of State. It was error, therefore, to submit to the jury this question. 122 Ark. 451, Act No. 313, Acts of 1907.

2. Argue the merits of the cause alleging many errors.

*E. G. Schoonover*, for appellees.

1. The certificate of the Secretary of State was not admissible in evidence. Kirby's Digest, § 3058; 2 Elliott on Ev., § § 1354-5; 1 Tenn. 220; Acts 1907, Act No. 313, Acts 1899, 305, etc. There was no proof that appellant ever complied with the laws of Arkansas.

2. There is no error in the instructions and the verdict is right and sustained by the evidence.

MCCULLOCH, C. J. This appeal is from judgments rendered in two consolidated actions at law instituted by appellant to recover amounts alleged to be due for sales of merchandise under written contracts which are identical in form and substance. Each of the purchasers under the alleged contracts were required to furnish guarantors who signed the respective bonds as such. In the action against appellee Martin his guarantors were joined as defendants and the same course was pursued in the action against appellee Nettle. The contract in the Martin case was executed on February 18, 1914, and the contract in the Nettle case was executed on December 1, 1913. On the trial of the cases below there was a verdict for the defendants in both cases.

Appellant is a Minnesota corporation domiciled at the city of Winona in that State, and at the time of the execution of the contracts in each of these cases had not complied with the laws of Arkansas permitting foreign corporations to do business here. The contention of appellant was, and is, that the contracts were for the sale of merchandise and that the sales constituted interstate commerce, which is not subject to the regulations of this State. In other words, that in each instance there was a sale of goods which took place in another State where the contract was lawful and that the shipment of the goods into this State constituted interstate commerce.

The sole issue tendered by the answer in each case so far as related to the principal defendant was that the contract was not for the sale of merchandise, but for the creation of an agency for the sale of merchandise by retail in the State of Arkansas, and that the contract was void because of the fact that appellant had not complied with the laws of this State allowing corporations to do business here. The guarantors also made the defense that there had been changes in the contract without their consent, and during the progress of the trial the court, over appellant's objections, permitted the pleadings to be amended so as to allow the guarantors to interpose the additional defense in one of the cases that they had notified appellant of their withdrawal from the contract as guarantors. During the progress of the trial appellant introduced in evidence a certificate of the Secretary of State bearing date of November 30, 1915, which was prior to the institution of these actions, to the effect that appellant had complied with the laws of this State by filing in the office of the Secretary of State a duly certified copy of its articles of incorporation, a certificate designating an agent upon whom service of summons or other processes might be had in any of the courts of this State, and resolutions of the board of directors, consenting that summons or other process might be had upon said agent, or upon the Secretary of State, and a statement of its assets and liabilities, a statement showing the number of shares of capital stock and the par value of each, the value of property owned and used by said corporation in the State of Arkansas, the proportion of capital stock of the company which is represented or employed in its business in the State, etc., and that said corporation had paid the fees required by law, and in all other things complied with the provisions of the statute.

The court allowed appellant to introduce this certificate over the objections of appellees, but in finally submitting the case to the jury the court gave instructions telling the jury that they must return a verdict for defendants unless they found from a preponderance of the

evidence that the laws of this State had been complied with. Other instructions were given, submitting the issues of the withdrawal of the guarantors, but we do not deem it necessary to review that feature of the case, since we have reached the conclusion that the judgment in each case must be reversed on account of the error of the court in its instructions concerning the authority of appellant to do business in this State. The effect of the court's rulings was to first hold that the certificate of the Secretary of State was admissible and later by its instructions to take that evidence away from the jury or weaken its force, because if the certificate was admissible it made a case of undisputed evidence as to the right of appellant to do business here. If the court was correct in its final ruling in the instruction that the authority to do business here had not been established by legal evidence, then there should be no reversal because of the apparent conflict in the rulings of the court in admitting the certificate and in finally instructing the jury, in effect, that the certificate was insufficient to establish the authority to do business. *Hightower v. Hightower*, 128 Ark. 95.

We have decided that a contract made by a foreign corporation before complying with the laws of this State is not void, and that where the statutes are complied with before the institution of the action the contract is enforceable. *Waxahachie Medicine Co. v. Daly*, 122 Ark. 451. Counsel for appellees defend the ruling of the court solely on the ground that the authority of appellant to do business in the State was not properly proved, the contention being that proof of the authority to do business is controlled by the general statute (Kirby's Digest, § 3058), providing for the introduction of certified copies of documents on file in the office of the Secretary of State, or by the terms of the act of May 8, 1899 (Acts 1899, page 305; Kirby's Digest, § 827), which provides that the Secretary of State "shall cause to be issued to said corporation a copy of such charter, or articles of incorporation, or certificate so filed, properly certified under the seal of his office, and a copy of such charter, or articles of incorpora-

tion or certificate, certified to by the Secretary of State shall be taken by all the courts of this State as evidence that the said corporation has complied with the provisions of this act, and is entitled to all the rights and benefits therein conferred."

It must be readily conceded that unless the statutes of this State direct the Secretary of State to grant to a foreign corporation a certificate of authority to do business in this State, such authority must be proved, when called in question, by the introduction of the documents on file in the office of the Secretary of State showing compliance with the laws of the State, for it is well settled that the existence and contents of documents in the custody of a public officer can not be proved merely by the officer's certificate of contents. On the other hand, it seems equally clear that if the statutes of the State which prescribe the terms upon which corporations shall do business in the State direct the issuance by the Secretary of State of a certificate of authority to do business, then such certificate is the best evidence of such authority, and must be received in evidence by the courts when the right of a corporation to do business here is called in question. The act of 1899, *supra*, contains an express provision as to how the authority of a foreign corporation to do business in the State shall be evidence and the provision is that it must be by a certified copy issued by the Secretary of State of the articles of incorporation, etc., filed in his office. If that statute is still in force, and no other method has been provided by law for evidencing the authority of a corporation to do business here, then the certificate of the Secretary of State was not admissible and the ruling of the trial court was correct. We have decided, however, in the case of *Western Union Telegraph Co. v. State*, 82 Ark. 302, that the act of 1899, regulating the doing of business by foreign corporations in this State, has been repealed by the act of April 23, 1901 (Acts of 1901, page 386), which contained no express provision as to how the authority of a corporation to do business should be certified. As to that feature of the act we said:

“It is true that the old act provided that the Secretary of State should issue to the corporation so complying with the law a certified copy of the articles or certificate so filed, but this added nothing to requirements upon the corporation. The same end is accomplished under the new act by filing the copy of the articles of incorporation with the proper officer, and a certified copy furnished by such officer would, in the absence of an express provision by statute to that effect, be evidence of compliance with the statute. Another statutory provision covers that as a rule of evidence. Kirby’s Digest, § 3058. At any rate, the fact that the old act contains provisions not embraced in the new does not prevent the application of the doctrine of repeal by implication or by substitution.”

The law on the subject stood in that condition until the General Assembly of 1907 enacted the statute which still remains in force prescribing the conditions upon which foreign corporations may do business in this State. The first section, which is the only one bearing on the present subject, reads as follows:

“Section 1. Every company or corporation incorporated under the laws of any other State, territory or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served. Provided, before authority is granted to any foreign corporation to do business in this State it must file with the Secretary of State a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Secretary of State of this State, in any action brought or pending in this State, shall be a



valid service upon said company; and if process is served upon the Secretary of State it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this act for each day it shall continue to do business in this State after such revocation."

Assuming that the general statute on the subject of evidence (Kirby's Digest, § 3058) controlled at that time, it seems clear to us from the reading of the above quoted section that the Legislature intended to confer upon the Secretary of State the power to grant a certificate of authority to corporations after the statutes have been complied with, and if that be true such certificate is the evidence of such authority. The statute provides that a copy of the charter or articles of incorporation, or a copy of the certificate of incorporation shall be filed with the Secretary of State. Then follows the provision that "before authority is granted to any foreign corporation to do business in this State, it must file with the Secretary of State a resolution," etc. In whom, then, does the statute vest the power to grant a certificate of authority? Certainly in the Secretary of State, and as there is no requirement in the statute for the issuance of a certified copy of the articles of incorporation so filed, then it necessarily follows that the lawmakers meant that the Secretary of State should merely issue a certificate of authority. This is made plain by the later provision in that statute with respect to revocation by the Secretary of State of the

authority granted to a corporation. The two powers of granting the authority and of revoking the same are clearly implied, we think, from the language of the statute. It has been so treated by this court in several cases, although the point has not been expressly raised before as to the form of certificate of authority issued by the Secretary of State. In the opinion of this court in *Waxahachie Medicine Co. v. Daly, supra*, the statement was made that the corporation suing in the case had complied with the laws of this State "and was issued a certificate authorizing it to do business in the State." Moreover, if there had been any doubt as to the meaning of the act of 1907, the question of the form of certificate is set at rest by the statute subsequently enacted by the General Assembly of 1911 (Acts of 1911, page 48), the title of which is "An act to prescribe the fees to be paid by corporations, and for other purposes." That statute is a lengthy one and prescribes the filing fees for corporations, both domestic and foreign. Section 13 provides that all of the filing fees shall be paid to the State Treasurer, and that "if the payment is made by a foreign corporation and such corporation has complied with all the laws of the State of Arkansas regulating foreign corporations, the Secretary of State shall issue it a certificate showing that it is authorized to do intrastate business in Arkansas."

It is not conceivable that the Legislature intended to prescribe two methods of proving the authority of a corporation to do business in this State, and the method impliedly prescribed by the act of 1907 and expressly by the act of 1911, are identical, and afford the exclusive method, which is by a certificate of the Secretary of State, and not a certified copy of the articles of incorporation and other documents required to be filed in that office.

It follows that the trial court erred in submitting to the jury the question of appellant's authority to do business in this State, for under the certificate introduced in evidence that authority was indisputably established. The judgments are reversed and the causes remanded for new trial.

WOOD and HART, JJ., dissent.

## DAVIDSON v. STATE.

Opinion delivered December 22, 1917.

1. **LARCENY—CATTLE—UNEXPLAINED POSSESSION.**—Under the testimony, *held*, the unexplained possession of certain cattle by the defendant, the cattle having been stolen the day before, would warrant a conviction for the larceny of the same.
2. **LARCENY—DRIVING AWAY CATTLE.**—Defendant may be convicted of larceny of certain cattle, as a principal, where the proof showed that he assisted his brothers, who actually took possession of the cattle, in driving the cattle out of the country; and the original asportation being still in progress, when defendant was arrested, the larceny will be regarded as still in progress.
3. **LARCENY—CATTLE.**—Defendant may be convicted of larceny of cattle, where, with a felonious intent, he assisted in driving the cattle into a corral, after his companions had actually stolen them.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; affirmed.

*A. Curl*, for appellant.

1. Defendant was charged as a principal in larceny. Kirby's Digest, § 1821; 37 Ark. 274; 41 *Id.* 173. It is only persons who are present aiding and abetting or consenting to aid and abet who can be indicted as principals. 55 Ark. 593. Hence it was error to refuse instructions 1 and 2, asked by defendant.

2. Nos. 5 and 6, given on the court's own motion, were erroneous. There must be a felonious taking from the owner and asportation. 79 Ark. 333; 110 *Id.* 606.

3. Mere possession of stolen property is not sufficient to convict. 34 Ark. 443; 1 Wharton, Cr. Law, § 729. There is no evidence connecting defendant with the crime. The court erred in failing to properly define larceny and what acts were necessary to constitute the offense.

*John D. Arbuckle*, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. There was no error in refusing instructions 1 and 2, asked by defendant. The presence of defendant when the cattle were stolen was not essential, if he was present and participated in the asportation. 130 Ark. 358. The record here does not contain all the instructions given. 121 Ark. 269; 125 *Id.* 393; 104 *Id.* 375, and many others.

2. The testimony of appellant affords ample ground on which to base No. 5, given.

3. No. 6 clearly states the law. 130 Ark. 358.

3. The court properly defined larceny, but no request was made by defendant for such an instruction. 71 Ark. 475; 86 *Id.* 360, 456; 102 *Id.* 588; 77 *Id.* 455, etc.

4. The evidence is sufficient. Possession of stolen property, unexplained, is a circumstance of guilt. 91 Ark. 492; 92 *Id.* 586; 55 *Id.* 244; 44 *Id.* 39; *Spivey v. State*, 133 Ark. 314.

HART, J. Isaac P. Davidson was indicted by the grand jury of Garland County for the crime of stealing two cows and two yearlings belonging to Elihu Robbins. He was tried before a jury and convicted, his punishment being fixed at imprisonment in the State penitentiary for the period of one year.

Elihu Robbins testified that at the time the cattle are charged to have been stolen that he lived in Montgomery County, Arkansas; that on the 13th day of December, 1916, he turned two cows and two yearlings out of his pasture; that one of the cows had a bell; that the cattle did not come up that night; that he did not sell or give the cattle to any one; that on the next day he was informed that the cattle were in a barn belonging to William Dozier in Garland County, Arkansas; that Dozier lived about five miles from him and that he went down there and saw the cattle and recognized them to be his own.

William Dozier testified that on the 14th day of December, 1916, while crossing a mountain in company with Ashley Ritter, near his home in Garland County,

Arkansas, he saw three men driving the cattle charged to have been stolen in this suit along a trail; that two of the men were behind the cattle driving them along and that one of them was on the side to keep them from straying from the trail; that he thought the defendant was one of the men driving the cattle; that he recognized the cattle as belonging to Elihu Robbins; that he went to a neighbor's house near by and called Robbins over the telephone and told him about seeing the men driving the cattle along; that Robbins said that he had not disposed of the cattle in any way; that the justice of the peace asked him and one Echols to try to capture the men; that he and Echols halted the men; that the men put spurs to their horses and ran away; that they fired a few shots to halt the men and that one of their horses was wounded; that the cattle came to his house and were put up and Robbins was notified that they were there.

Ashley Ritter testified that he was with Dozier on the 14th day of December, 1916, and saw three men driving some cattle along a trail near Dozier's house; that the defendant was one of the men; that the defendant and another man were behind the cattle driving them and that another man was on the side of the mountain keeping them in the trail; that he did not know the cattle and did not know whose they were.

Other evidence on the part of the State tended to show that it was reported in the neighborhood that the cattle were stolen and that the defendant and the other two men were making an attempt to escape; that people along the road tried to arrest them and shot the two men that were with the defendant; that all three of the men had guns and that the two men with the defendant shot back at the men who were trying to arrest them. The defendant had a pistol on him when arrested but did not try to use it.

One of the witnesses said that he endeavored to hold up the parties, and that all three of them turned their guns on him and kept running; that the oldest one threat-

ened to shoot him if he moved; that the defendant looked like one of these three men.

According to the testimony of the defendant himself, he was living with his parents at Fort Lawson, Oklahoma, and was going to school there. In the latter part of February, 1916, he left home and went to Texas. He went to work with a farmer in Texas and stayed with him for three months. During the latter part of July, he received a letter from one of his brothers at Hot Springs, Arkansas. In his letter, his brother stated that there was plenty of work there and that it was a fine place for a young fellow to come. His brother had gotten into trouble in Oklahoma and had changed his name because he thought there was a warrant out for him. His brother also wrote him that he had written another brother to come, too. The defendant went to Hot Springs to meet his brothers about the 3d of August, 1916. He changed his name so that his father and mother could not trace him. When he arrived at Hot Springs he was told by the foreman of a stave yard that he could secure employment at a place near there where stave bolts were manufactured. His brothers were not in Hot Springs as they had promised and he left a card for them, and secured work at the stave mill. About two weeks after he went to Hot Springs his oldest brother came to him and told him that he and another brother were at work at a sawmill not far from there. In a short time the defendant went up to the sawmill and joined his brothers. They worked there a while and then went to a mill in Saline County, Arkansas. The defendant worked at that mill about fifty or sixty days. His brothers did not work much and spent their time riding about the country. One time his brothers went off and were gone about six weeks and brought back horses with them. The defendant became suspicious and asked them where they had gotten the horses and they told him that they had bought them in Kansas. The defendant told his brothers that their conduct looked suspicious and that he would leave them if there was anything going on that

was crooked. They told him that it was none of his business and that he was not liable to get into anything.

In regard to the immediate transaction which resulted in the larceny in question, the defendant testified that one Sunday morning his oldest brother said that he was going out to buy some cattle that day; that he asked him where he would get the money; that his brother pulled a roll of bills out of his pocket and said that he had it; that on Monday morning they started out to buy cattle; that he did not want to go but that his brother insisted, saying that he would need him to drive in the cattle; that it was pretty cool and they put on heavy clothes; that his brother advised him to take a gun along in case of robbers or anything of that kind; that he carried a gun in a scabbard in his hip pocket; that they traveled about twenty-five miles in a westerly direction and camped at night on the side of the road in a house; that the next morning they rode until dinner time and one of the horses became lame; that they left him at the camp with the lame horse and went off to buy cattle; that they rode around that day and night and the next and came back and reported that they could not buy any cattle; that they found a corral and left the defendant there and were gone all night; that the next morning his brothers came in with the four head of cattle and penned them in the corral; that they said that they had bought the cattle; that they again went off and left him there with the cattle and came back again the next morning. They said that they had been unable to buy any more cattle. It began to snow and they said that they would not buy any more until the weather cleared up; that they started to drive the cattle along the trail and that they were attacked by people who tried to arrest them; that they tried to run off; that his brothers were killed in the running fight; that he escaped but was captured the next day.

The defendant's father testified that he was seventeen years old.

(1) The defendant was found in the possession of the stolen cattle. It is true he attempted to explain his

possession but the jury might have found that his explanation was not true and that his possession was inconsistent with his innocence. In short, after recounting the testimony just stated, the unexplained possession by the defendant of the property stolen on the day before, together with the other circumstances detailed in evidence, were sufficient to warrant the jury in returning a verdict of guilty. *Spivey v. State*, 198 S. W. (Ark.) 101.

Counsel for the defendant assign as error the action of the court in refusing to give instruction No. 2, asked by him, which is as follows: "The court instructs the jury that if the defendant did not steal the cattle and was not present when the same were stolen (if the cattle were stolen), aiding, advising, abetting, encouraging or assisting such stealing, then the defendant was not guilty and should be acquitted."

In making this contention counsel did not take into consideration the principles of law announced in the case of *Monk v. State*, 130 Ark. 358. In that case the court held that under an indictment for larceny as a principal, one who was not present when the hogs were killed and carried away, but who hauled them to market, and knew of the plan to steal them could be convicted as a principal.

(2) Here the facts are even stronger. The defendant was assisting his brothers in driving the cattle out of the country and the larceny may be regarded as still in process of accomplishment, for the original asportation was still in progress.

(3) It was also insisted by counsel for the defendant that the court erred in giving instruction No. 5 at the instance of the State. The instruction is as follows:

"No. 5. If you believe from the evidence in this case, beyond a reasonable doubt, the defendant with felonious intent to steal cattle, accompanied his two brothers to a corral, and that he remained there while his two brothers went after the cattle, or in search of them, and you further believe from the evidence beyond a reasonable doubt that the brothers feloniously took the cattle



mentioned in the indictment to the corral, and the defendant assisted the brothers in driving the cattle away from the corral, with the felonious intent of stealing the same, and that this offense occurred some time during the year of 1916, then you should find the defendant guilty."

This instruction is in accord with the principles of law laid down in the Monk case.

It is claimed by the defendant, however, that there was no evidence in the record upon which to base the giving of this instruction. We do not agree with counsel for the defendant in this contention. According to the defendant's own testimony he was suspicious of his brothers and thought they were being engaged in crooked work of some kind. When he mentioned this to them they told him that it was none of his business and that he would not get into any trouble. The defendant himself admitted that he stayed at the corral while his brothers were riding about in the night time in the month of December, ostensibly for the purpose of buying cattle. He also admitted that he went along with his brothers for the purpose of helping them to drive the cattle. All three of the brothers were armed with pistols. It had begun to snow when the cattle were brought in. They at once started off with the cattle without trying to buy any more. When halted they endeavored to run away. They had a running fight with the people in the neighborhood and finally abandoned the cattle and tried to get out of the country. When this and the other circumstances detailed in evidence are considered it will be readily seen that there was sufficient evidence upon which to base this instruction.

Other instructions requested by the defendant and still others given by the court at the instance of the State are assigned as error calling for a reversal of the judgment of conviction. These instructions all involve the principles of law which we have just discussed and for that reason we do not deem it necessary to set them out and discuss them separately.

We have carefully examined the record and find no prejudicial errors in it. The judgment will therefore be affirmed.

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JEAN v. HOPE FERTILIZER COMPANY.

Opinion delivered January 14, 1918.

**FRAUDULENT CONVEYANCES—HUSBAND TO WIFE.**—Conveyances from a husband to his wife are presumed to be voluntary, and as against his creditors, the burden is on the wife to show the transaction was not voluntary.

Appeal from Union Chancery Court; *James M. Barker*, Chancellor; affirmed.

*Neill C. Marsh*, for appellants.

Whether the deed was voluntary and fraudulent is a question of fact. The law is that such deeds are voluntary, and places the burden on the wife to show a valid consideration free from fraud. There is no conflict in the evidence. The wife was able to buy, and the testimony shows she paid in all over \$2,000 for the land. No intent to defraud creditors is shown. The decree of the chancellor is contrary to the preponderance of the evidence.

*Lemley & Lemley* and *J. D. Trimble*, for appellee.

The conveyance is presumed to be voluntary, and the burden was on appellees to show it was not voluntary but was for a fair and valuable consideration.

No money was paid at the time and no notes were given for the purchase money. The deed recited a cash consideration and contained all of Jean's property. His wife knew of his debts and the hazards of a fertilizer business. There is no satisfactory evidence of the payment of the \$2,000. All these circumstances are badges of fraud. 113 Ark. 100; 50 *Id.* 314; 85 *Id.* 225.

The chancellor's finding is supported by the evidence.

**HUMPHREYS, J.** Appellee instituted suit against appellants in the Union Chancery Court to cancel as vol-

untary and fraudulent a deed to 250.70 acres of land in Union County, Arkansas, executed on the 27th day of July, 1914, by J. D. Jean to Gertrude Jean, his wife; and to subject said real estate to the payment of a judgment which it obtained in a magistrate's court against J. D. Jean, H. H. Bishop, M. J. Bishop, A. Brown and W. E. Brown, for \$204.93, on the 20th day of May, 1916. Appellants filed separate responses, denying that the conveyance was voluntary or made to defraud appellee or hinder or delay it in the collection of its debt.

The cause was submitted upon the pleadings, oral and record evidence, from which the chancellor found that the conveyance, though executed for a pretended consideration of \$2,000, was voluntary and made for the purpose of hindering, delaying and defrauding creditors, and decreed a cancellation of the conveyance and ordered a sale of the real estate to pay said indebtedness.

The correctness of the chancellor's finding and decree is challenged by appeal to this court.

In the spring of 1914, J. D. Jean incurred an indebtedness of \$830.37 for fertilizer to the Hope Fertilizer Company. The contract under which he ordered the fertilizer provided that he should turn over to the company the cash sales prior to May 1, 1914, and to endorse the notes representing the credit sales he made to various parties.

He was at the time engaged in operating a farm of 250.70 acres owned by him near Three Creeks, and on busy days assisting his wife in running her store. She had accumulated quite a little sum from a dairy business and with the savings entered into the mercantile business at Three Creeks.

On the 27th day of July, 1914, while J. D. Jean was indebted to the Hope Fertilizer Company and others, he conveyed his farm of 250.70 acres near Three Creeks to Gertrude Jean, his wife, for a purported consideration of \$2,000. No money was paid at the time. No notes were executed for the purchase money. Mrs. Jean testified that she paid for the land in the following manner:

That in the year 1914 she paid about \$550 on her husband's fertilizer accounts, mostly to other companies, and \$440 to two of her husband's farm hands, and furnished one of her husband's tenants an indefinite amount; and in 1915, paid two notes, one for \$120 and another for \$240. The following question was propounded to her and the following answer given with reference to the two notes:

Q. In 1915 did you make another payment?

A. Yes. Two notes, one for \$120 and another for \$240; that is, I boarded him and his wages was \$240.

She made the general statement that the amounts paid on the notes and for fertilizer and goods furnished totaled \$1,909.15 and that she paid the balance in money.

J. D. Jean testified that the land was conveyed to his wife for a consideration of \$2,000; that his wife paid \$550 on his fertilizer accounts, including three small notes representing a portion of the fertilizer indebtedness due appellee, and that the balance was paid in supplies and money advanced to hands and tenants out of the store of his wife.

The judgment for \$204.93, constituting the basis of this action, was procured on the 20th day of May, 1916, before W. E. Mason, a justice of the peace, on a renewal note executed on November 1, 1915, for \$217.50 by J. D. Jean, H. H. Bishop, M. J. Bishop, A. Brown and W. E. Brown, for a balance due appellee for fertilizer sold by J. D. Jean to W. E. Brown out of the shipment ordered by him in the spring of 1914. The note bore 8 per cent. per annum and \$30 was paid on it before the institution of the suit. Execution was raised and returned *nulla bona*. A transcript of the judgment was filed in the office of the circuit clerk in said county, and judgment was entered as provided by statute. An execution was issued thereon and no property could be found belonging to J. D. Jean or his co-obligors out of which the judgment could be satisfied.

Both J. D. Jean and Gertrude Jean were of opinion that J. D. Jean should not pay the debt for the reason that another party used the fertilizer. Mrs. Gertrude Jean

knew that her husband owed appellee a large amount for fertilizer at the time she accepted the deed. They justified the conveyance on the ground that it was necessary for him to sell the farm to pay his debts. The fair market value of the farm was \$2,000. After the conveyance was made, J. D. Jean remained in possession and control of the farm and it was assessed in his name in 1915. He also conveyed a right-of-way across the land to a lumber company after he made the conveyance to his wife but says he did it under her direction. Mrs. Gertrude Jean started her business career on one cow and a calf, a marriage gift, and inherited two or three more from her father's estate. She accumulated a herd of fifty head of cattle aside from those killed and sold; and, in addition, acquired a wagon and team, a stock of merchandise valued at about \$2,500, and all her husband's farm lands. As far as the record shows, J. D. Jean started with a farm, and during the same period of his wife's prosperity, without suffering any material losses or meeting any adverse conditions except the war conditions that caused cotton to fall in price in 1914, acquired nothing by his years of labor, but lost a valuable farm. Mrs. J. D. Jean had ample means to buy the farm at the time she acquired it. This constitutes the substance of the record as we read it.

Conveyances made by the husband to the wife are presumed to be voluntary. As against the claims of existing creditors, the law places the burden upon the wife to show that the conveyances were for fair and valuable considerations and not voluntary. Under this rule of law, the only question for determination is whether the finding of the chancellor is contrary to a clear preponderance of the evidence.

It is contended by appellant that the record, without conflict, reflects that Mrs. Gertrude Jean had the means to purchase the farm, and that she paid indebtedness of her husband in the sum of about \$2,000 as consideration for it, which was its fair market value. So far as showing her ability to buy the farm, Mrs. Jean has met the

burden placed upon her by the law, but she failed to meet the burden with reference to showing that she paid for it. According to her evidence, she paid \$550 on fertilizer debts, \$450 to hands and some advances to a tenant in the year 1914. Her statement as to what she paid in 1915 is not understandable. If she meant that her husband's wages amounted to \$240, then a payment by her must be regarded as a payment by her on his wages and not a payment on the land. If it was a payment to the hands, she failed to say so in her testimony. If the \$120 note covered board for her husband, the charge was a new departure in their manner of living. Her testimony is not sufficiently clear to say that the \$120 note covered board for a hand. No explanation was made as to why the items of board and wages were covered by notes. At another place in her testimony, she testified that her husband made his way. However, these two items, when added to those paid in 1914, total only \$1,360, instead of \$1,909.15. These seem to constitute the only items to which she has definitely testified and fall far short of showing that she paid the consideration for the farm. Mrs. Jean's evidence is not at all satisfactory as to the amounts and manner of payment. Nothing seems to have been paid at the time of the execution and delivery of the deed. The consideration recited was \$2,000 cash in hand paid. No debts were assumed in the face of the deed. No note was given for the purchase money. The deed seems to have been made without consideration. Later in the year 1914 Mrs. Jean paid \$1,000 on her husband's debts and by agreement between them, presumably at the time of payment, it was treated as a payment on the land. The payment of the two notes in 1915, one for \$120 and the other for \$240, was treated in the same manner between the parties. Mrs. Jean's evidence concerning the payment of those two notes is so hazy that the court can not even regard the explanation as sufficiently clear upon which to make a definite finding. We do not regard the reasons assigned for making the sale as sound and plausible. It is said by both parties that the sale was made for

the purpose of enabling J. D. Jean to pay his pressing debts. The only debts he owed were nondue debts to the appellee for fertilizer, and debts to several other fertilizer companies for about \$500 and some amounts to his wife for advances made to his hands and tenants. He was not being pressed, and it was wholly unnecessary for him to make the sale. At the time he made the deed he had outstanding obligations that might, or might not, become pressing at a later period. The purpose of the deed may have been to prepare for such a contingency.

We do not think the appellant in this case has met the burden placed upon her by the law; at least, we can not say that the finding of the chancellor is contrary to a clear preponderance of the evidence.

The decree is affirmed.

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JOHNSON v. STATE.

Opinion delivered February 4, 1918.

1. ASSAULT WITH INTENT TO KILL—DRAWING PISTOL—THREATS.—The act of drawing a pistol, if accompanied by threats evidencing an intention to use it on the person threatened, constitutes an assault. The turning point of the question of whether a given act does or does not constitute an assault is whether the overt act is merely in preparation for this assault or a part of the perpetration of the assault.
2. ASSAULT—INTENT TO KILL—WHAT CONSTITUTES THE OFFENSE.—Mere preparation for an assault does not complete the offense, but any overt act in partial execution of the design to make an assault completes the offense. The drawing of a deadly weapon, if so intimately connected with its use that it can not be said to be merely a preparation for the use, but is a part of the use itself, such an act constitutes an assault when accompanied by evidence of an intention to immediately use the weapon.
3. ASSAULT—INTENT TO KILL—DRAWING WEAPON—THREATS.—A constable undertook to arrest appellant, whereupon appellant drew a pistol, which was taken from him in a scuffle. Appellant exclaimed that he would die before he would turn the weapon loose, and that he would die before he would suffer himself to be taken by the officer. *Held*, appellant's acts and declarations were sufficient to indicate his murderous intent, and to warrant the inference that he drew the pistol with the intent to kill the officer who was about to arrest him.

4. CRIMINAL LAW—INSTRUCTION UPON DEGREE OF CRIME.—Where the evidence warranted a conviction of the crime of assault with intent to kill, it is not error for the court to refuse to instruct the jury upon defendant's guilt of a lesser degree of the crime charged upon its own motion, where the defendant failed to request an instruction upon the lesser degree.

Appeal from Hempstead Circuit Court; *George R. Haynie*, Judge; affirmed.

*L. F. Monroe* and *Steve Carrigan, Jr.*, for appellant.

1. There was no evidence to support the verdict. The court narrowed the inquiry of the jury to the question whether or not the appellant was guilty of an assault with intent to kill. The question of guilt or innocence of the lower grades of assault was not submitted to the jury, hence there was no evidence of guilt of assault with intent to kill. 11 Ark. 630; 13 *Id.* 712; 34 *Id.* 639; 44 *Id.* 121; 2 *Id.* 360; 5 *Id.* 407; 6 *Id.* 86, 428; 10 *Id.* 138; *Ib.* 491, 638; 26 *Id.* 309. A specific *intent* must be proven. 39 *Id.* 491; 54 *Id.* 284; 91 *Id.* 505; 54 *Id.* 497.

2. The court should have instructed on the lower degrees of assault. 43 Ark. 295; 72 *Id.* 569; 74 *Id.* 452; 91 *Id.* 507; 102 *Id.* 185; 109 *Id.* 423.

*John D. Arbuckle*, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The evidence was sufficient to support the verdict. The *intent* was proven. 103 Ark. 28; 115 *Id.* 566. The verdict will not be disturbed when supported by any substantial evidence. 46 Ark. 141; 31 *Id.* 196; 22 *Id.* 213; 101 *Id.* 51; 103 *Id.* 4; 95 *Id.* 321; 100 *Id.* 330; 104 *Id.* 162; 92 *Id.* 586.

2. There was no error because the jury were not instructed as to the lower grades. The only instruction asked, No. 16, was given, and it was not error. No other was asked. 100 Ark. 195; 110 *Id.* 300; 114 *Id.* 201; 103 *Id.* 28; 95 *Id.* 409.

McCULLOCH, C. J. Appellant was convicted of the crime of assault with intent to kill, and the principal ground urged for reversal of the judgment is that the



testimony was not sufficient to prove the assault. Bowden, the assaulted person, was constable of his township, and went to appellant's house with a warrant to arrest the latter. The officer was accompanied by two other men, and when he went to appellant's door and knocked appellant's wife answered, inquiring who was at the door, and the officer stated that he had a warrant for appellant and demanded that the door be opened. Appellant came to the door and opened it a few inches and attempted to draw his pistol. The officer grabbed the pistol, and as the two men struggled over it appellant exclaimed, "God damn you, I'll die before I turn it aloose." He also said in the struggle, "I'll die before I go with you." Appellant was finally disarmed and taken under arrest by the officer and those who accompanied him, and on the trip to town he used profane and abusive language and declared that he would kill the officer if it was the last thing he ever did.

That is the substance of the State's testimony, which we must accept as true under the verdict of the jury, although it is in conflict with the testimony adduced by appellant and his witnesses.

(1-2) The question presented is whether a mere drawing of a pistol with intent to use it, but without actually presenting it in the attitude of firing constitutes an assault. There is a conflict in the authorities on this question (2 Wharton's Criminal Law, § 800; 2 Bishop on Criminal Law, § § 30 and 31; *People v. McMakin*, 8 Cal. 547; *State v. Epperson*, 27 Mo. 255; *State v. Marsteller*, 84 N. C. 726; *Tarver v. State*, 43 Ala. 354), but we are of the opinion that the better rule is that the act of drawing the pistol, if accompanied by threats evidencing an intention to use it on the person threatened, constitutes an assault. The turning point of the question of whether a given act does or does not constitute an assault is whether the overt act is merely in preparation for the assault or a part of the perpetration of the assault. *Anderson v. State*, 77 Ark. 37. Mere preparation for an assault does not complete the offense, but any overt act in

partial execution of the design to make an assault completes the offense. The drawing of a deadly weapon, if so intimately connected with its use that it can not be said to be merely a preparation for the use, but is a part of the use itself, such an act constitutes an assault when accompanied by evidence of an intention to immediately use the weapon.

(3) Our conclusion is that the evidence was sufficient to justify the finding by the jury that appellant assaulted the officer with intent to kill him and was prevented from doing so only by the timely act of the officer in seizing the weapon in appellant's hand. Appellant did not in so many words declare at the time his intention to kill the officer, but his declaration accompanied by an oath that he would die before he would turn the weapon loose, and that he would die before he would suffer himself to be taken by the officer, was sufficient to indicate his murderous intent, and to warrant the inference that he drew the pistol with the intent to kill the officer who was about to arrest him. *Davis v. State*, 115 Ark. 566.

(4) It is next insisted that the evidence was sufficient to warrant a submission of the question of appellant's guilt of a degree of offense lower than assault with intent to kill, and that the court erred in failing and refusing to give an instruction on the lower offense. The answer to that contention is that appellant failed to ask for a correct instruction on the lower offense, and it was not error for the court to fail to give such an instruction on its own motion. *Allison v. State*, 74 Ark. 452. The only instruction on that subject requested by appellant, which the court refused to give, was in substance that if the jury found from the evidence that if death had ensued, the killing would have only been manslaughter, they could only find the defendant guilty of assault and battery. That was not a correct instruction for the reason that appellant could have been convicted of an aggravated assault, and it was improper to tell the jury that if the offense did not constitute assault with intent to kill, it would only be assault and battery. Besides, there was no battery

charged in the indictment, and the instruction was incorrect in embracing an offense which contained that element. Judgment affirmed.

BEAL-BURBOW DRY GOODS COMPANY v. KESSINGER.

Opinion delivered February 4, 1918.

1. DOWER—RIGHT OF WIDOW TO ASSIGN.—A widow takes as dower an undivided one-third interest absolutely in the personal property of her deceased husband, and immediately upon the death of her husband her interest becomes subject to transmission by conveyance or inheritance, and she may assign her dower in her husband's personalty.
2. DOWER—ASSIGNMENT OF—CONSIDERATION.—One K. purchased goods from plaintiff, on credit, plaintiff retaining title. K. then died. *Held*, an agreement by plaintiff to release to K.'s widow its right to assert title, and a promise to take as a common creditor was a good consideration for an assignment by the widow of her dower interest in her husband's personal property to plaintiff.
3. DOWER—CONCURRENT EQUITY JURISDICTION.—Courts of equity have concurrent jurisdiction in cases of dower in legal estates.

Appeal from Cleburne Chancery Court; *George T. Humphries*, Chancellor; reversed.

*Wm. T. Hammock*, for appellant.

1. It was error to sustain the demurrer. The court had jurisdiction. The widow's dower was assignable and enforceable by the assignee. 2 *Lawson, Rights, Rem. & Pr.*, § 773; 12 *Ind.* 37; 74 *Am. Dec.* 200; *Kirby's Digest*, § 2708; 62 *Ark.* 61; 2 *Scribner on Dower*, 42, 47; § § 33, 38; 84 *Ark.* 558.

The appellee, *pro se*.

1. The court was without jurisdiction. *Kirby's Digest*, § 1340.

2. Appellant's remedy at law was adequate. *Kirby's Digest*, § 2708; 116 *Ark.* 400, 427; *Bisph. Eq.* (7 ed.), § 37; 27 *Ark.* 97; *Ib.* 157; 32 *Id.* 478; 109 *Id.* 171; 106 *Id.* 552.

3. The complaint does not state facts sufficient to constitute a cause of action. There was no consideration for the contract. 6 *R. C. L.* 683; *Bishop on Cont.*, § § 40, 77; 68 *Ark.* 276.

## STATEMENT OF FACTS.

This appeal involves the right of the Beal-Burrow Dry Goods Company to have set apart to it dower in the personal property of the estate of James S. Kessinger, deceased, which they allege has been assigned to them by his widow after his death.

The complaint of the Beal-Burrow Dry Goods Company sets up a state of facts substantially as follows: On the 30th day of April, 1916, James S. Kessinger died in Cleburne County, Arkansas. A few weeks before his death the Beal-Burrow Dry Goods Company sold and delivered to him a stock of merchandise of the value of \$1,375. It was understood between the parties that the title and ownership of the stock of goods should not pass from the vendor until the purchase price was paid. At the time of the death of James S. Kessinger, no part of this sum had been paid and the title to the merchandise still vested in the Beal-Burrow Dry Goods Company. Alice Kessinger, the widow of said James S. Kessinger, became the administratrix of his estate, and as such took possession of said stock of merchandise. She entered into a written agreement with the Beal-Burrow Dry Goods Company whereby in consideration of its waiving its right to assert title to said goods and filing its claim as a common creditor of said estate, she assigned and transferred to said dry goods company all her right, title and claim of dower in the personal estate of said J. S. Kessinger, deceased, except one horse and buggy, one cow and calf, feed and household goods. The value of the personal estate left was \$2,100 and the dower interest of the widow amounted to \$700. The prayer of the complaint was that the administratrix be required to pay to the dry goods company her dower interest in the personal property in accordance with the agreement, which amounted to the sum of \$700.

The defendant filed a demurrer to the complaint and for grounds states:

*First.* That the court had no jurisdiction of the subject of the action.

*Second.* That the plaintiff had a complete and adequate remedy at law.

*Third.* That the complaint did not state facts sufficient to constitute a cause of action.

The court sustained the demurrer to the complaint and the plaintiff declining to plead further, dismissed its complaint for want of equity. The plaintiff has appealed.

HART, J., (after stating the facts). (1) Under our statutes the widow is entitled, as part of her dower, absolutely in her own right, to one-third of the personal estate. Kirby's Digest, § 2708. The statute gives the widow an absolute estate in the personal property which vests immediately upon the death of the husband. She takes absolutely an undivided one-third interest in the personal property and immediately upon the death of her husband her interest becomes subject to transmission by conveyance or inheritance. She therefore had a right to assign her dower in the personalty to the plaintiff.

(2) There being no statute to the contrary, the plaintiff had a right to sell the stock of goods to J. S. Kessinger and retain the title in itself until the goods were paid for. *Jones v. Bank of Commerce*, 199 S. W. 103, 131 Ark. 362. Kessinger had not paid any of the purchase price of the goods at the time of his death. The release by the plaintiffs of their right to assert title in the goods and their agreement to file their claim as a common creditor of the estate at the instance of the widow, formed a valuable consideration for the agreement whereby she assigned to it her dower interest in the personalty. See *Harrow v. Johnson*, 3 Metc. (Ky.) 578.

(3) It is now well settled that courts of equity have concurrent jurisdiction in cases of dower in legal estates. *Johnson v. Johnson*, 84 Ark. 307, and cases cited, and Pomeroy's Equity Jurisprudence, vol. 4, (3 ed.), § 1382. At first the jurisdiction of equity was ancillary to proceedings at law. The jurisdiction in equity developed until it could afford complete relief between the parties.

Among the advantages in equity named by the same author are that a partition of undivided interests could be decreed and an account could be taken, fraudulent conveyances could be set aside, and antagonistic claims to the subject-matter could be determined without multiplicity of suits. The jurisdiction of courts of equity to assign dower was acquired while the widow was only entitled to dower in the real estate of her deceased husband. Some, at least, of the same reasons would have existed for the exercise of the jurisdiction of courts of equity in the assignment of dower had the widow been entitled at common law to dower in the personal estate of her deceased husband. This is shown by analogy in the equitable jurisdiction for the partition of personal property. Although the inception of equitable jurisdiction for the partition of chattels is not traceable with certainty, the jurisdiction itself is unquestionable; and where a literal partition is not practicable, the chancery court will order a sale. *Pomeroy's Equitable Juris.*, vol. 4, (3 ed.), § 1391. Courts of equity in the partition of personal property have assumed jurisdiction to determine as well the issue of title as any other issue pertinent to the case. *Ib.*, § 1392. The same reason would exist for the exercise of equitable jurisdiction in the assignment of dower in personal property as would exist in the partition of personal property.

It follows that the decree will be reversed and the cause will be remanded with directions to assign the dower interest of Alice J. Kessinger in the estate of James Kessinger to the plaintiff as requested in the complaint.

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HOLMES v. STATE.

Opinion delivered February 4, 1918.

**LIQUOR—ILLEGAL SALE—ACTS OF DEFENDANT—SUFFICIENCY OF PROOF.—**

In order to convict a defendant who owned a part interest in certain liquor, of an illegal sale thereof, the State must show that the defendant had some interest in the sale, and *held*, under the proof in this case, such facts were not shown.

Appeal from Ouachita Circuit Court; *C. W. Smith*, Judge; reversed.

*Thos. W. Hardy*, for appellant.

1. The evidence is not legally sufficient to sustain the verdict. There is no evidence that appellant sold any whiskey, or that he was interested in the sale of any. 23 Cyc. 284; 124 Ark. 585; 67 Ark. 163.

2. It is the duty of the court to set aside the verdict when it is against the weight of the evidence, and not warranted by the evidence. 98 Ark. 336; 65 *Id.* 279; 106 S. W. 1125; 29 Cyc. 832.

*John D. Arbuckle*, Attorney General and *T. W. Campbell*, Assistant, for appellee.

Set forth all the evidence in the case and submit it to the court to determine whether the proof is sufficient.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Ouachita circuit court of the crime of selling whiskey, and his punishment fixed at one year in the State penitentiary. Proper steps were taken and an appeal has been prosecuted to this court.

The question presented by the appeal is whether the evidence is sufficient to sustain the verdict.

In determining this question, the strongest probative force must be given the evidence in favor of the verdict. Interpreting the evidence in its strongest aspect, it disclosed that the appellant was a joint owner in liquors sold, without his knowledge and consent, by Buddie Robinson, his copartner in the liquors, who appropriated the entire proceeds of the sale. The facts and circumstances attending the transaction are as follows:

Prior to the passage of Act 13, Acts of Arkansas, 1917, appellant and Buddie Robinson ordered from Monroe, La., 12 quarts of liquor. It was shipped in the name of Buddie Robinson. It came in a box in pint bottles and was opened and kept in the shop where Buddie Robinson worked. During that time four or five pints were used

by them. A boy by the name of Roebuck found out where the whiskey was and they carried it in a valise to Mary Jane Johnson's room. This occurred in the afternoon. About seven o'clock that evening they went back to the girl's house and got two or three drinks, then returned to town. Appellant decided to go back to the house on account of being under the influence of liquor and went to sleep across the girl's bed. While Buddie Robinson was talking to Smeadham Cooper on the street, Dave Poindexter approached them to ascertain whether they knew where he could get some liquor. Buddie Robinson went out with them in an automobile to the Johnson girl's house. Dave Poindexter gave Buddie Robinson \$6 and he went into the house and remained quite a while. Fearing that he had escaped with the money, Poindexter knocked on the door and Buddie Robinson came out with four pints of whiskey. When Buddie Robinson went in, he found appellant in a drunken stupor on the bed and could not arouse him. He then went to the grip and got the liquor and took it out to Dave Poindexter. The record fails to show that either of these parties had sold any liquor prior to this time.

The indictment charged as follows: "The said defendant, on the 16th day of April, 1917, in Ouachita County, Arkansas, did unlawfully and feloniously sell and was interested in the unlawful and felonious sale of whiskey."

It was not only necessary to establish a sale under the indictment, but it devolved upon the State to connect appellant with it. It was incumbent upon the State to show that appellant had some interest in the sale. *Bobo v. State*, 105 Ark. 462. A conviction cannot be riveted upon a defendant in a charge of this character by facts and circumstances that do not necessarily imply guilt. The facts and circumstances detailed in the record are strong enough to raise a suspicion or conjecture that appellant was interested in the sale, but are not of the requisite, substantial character necessary to support a



verdict of guilty. *State v. Bach Liquor Co.*, 67 Ark. 163; *Scoggin v. City of Morrilton*, 124 Ark. 585.

For this reason, the judgment must be reversed and the cause remanded for a new trial.

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STATE v. BRANCH, COUNTY JUDGE.

Opinion delivered January 28, 1918.

**INHERITANCE TAX—PROCEEDINGS IN PROBATE COURT—NOTICE TO ATTORNEY GENERAL.**—In proceedings in the probate court, under the act of 1913, page 824, to collect the inheritance tax, the proceedings are not void because the Attorney General was not notified of the same.

Appeal from Greene Circuit Court; *W. J. Driver*, Judge; affirmed.

*John D. Arbuckle*, Attorney General, and *Troy Pace*, *R. E. L. Johnson* and *T. D. Crawford*, special counsel, for appellant.

1. The dismissal of petitioner's appeal was without prejudice to any other remedy by the State. The matter is not *res judicata*. 52 Ark. 376; 11 *Id.* 621; 29 *Id.* 318; 54 *Id.* 551; 16 Tex. 590.

2. The State is a necessary party under the Act of 1913. A judgment without notice is void. 93 Ark. 274; Acts 1913, 837-840.

*W. S. Luna* and *S. R. Simpson*, for appellee.

1. Sec. 13 Acts 1913, 835, etc., provides for no adversary proceeding. The State is not a necessary party. A liberal construction of the Act in favor of the taxpayer and against the State is indulged. 125 Ark. 385; 120 *Id.* 295; 100 *Id.* 175.

2. The law has been strictly complied with. The State elected to appeal and can not bring *certiorari*. 122 Ark. 278; 91 *Id.* 112; 61 *Id.* 605. No notice is necessary as this is not an adversary proceeding.

**McCULLOCH, C. J.** The Attorney General seeks to quash a judgment brought up by a writ of *certiorari*.

issued by the circuit court of Greene County, rendered by the probate court of that county in fixing the amount of an inheritance tax due on the estate of a certain decedent. The circuit court refused to quash the judgment of the probate court and an appeal has been prosecuted to this court.

The proceedings arose under the Act of March 24, 1913, (Acts of 1913, p. 824) fixing the tax on inheritances and prescribing the method of assessment and collection of same, before that statute was amended by the Act of February 16, 1917, (Acts of 1917, p. 455). The probate court of Greene County, on application of the widow and devisee of the estate of J. W. Stuart, deceased, caused an appraisement of the property of said decedent to be made for the purpose of fixing the amount of the inheritance tax, and upon the report of the appraisers coming in made an order fixing the amount of the tax upon the inheritance so appraised. The Attorney General was not notified of the proceedings and he insists now that the judgment is void on that account. The contention of that officer is that the proceedings in the circuit court for the purpose of fixing the amount of an inheritance tax constitutes a controversy between the State and the parties who owe the tax, and that a judgment fixing the amount of the tax is void unless the proceedings are instituted by the Attorney General, or that he be notified so as to appear and represent the State's interest.

The determination of that question involves, of course, the construction of the language of the statute. Section 9 of the Act of 1913 provides that the tax imposed by the statute shall be due and payable at the death of the decedent and if paid within six months no interest shall be charged, but if not paid until after six months, interest shall be paid at the rate of six per centum per annum, and if not paid within twelve months that a penalty of ten per centum shall be added in addition to the interest. Section 10 requires every administrator, executor or trustee having in charge any legacy or property for

distribution subject to the tax to deduct the tax therefrom, and Section 12 provides that all inheritance taxes levied and collected shall be paid into the treasury of the State. Section 13 reads, in part, as follows:

“(1). When the value of any inheritance, devise, bequest or other interest subject to the payment of said tax is uncertain, the probate court in which the proceedings are pending, on the application of any interested party, at the instance of the Attorney General or upon its own motion, shall appoint some competent person as appraiser, as often as, and whenever occasion may require, who shall be a sworn officer of the court and whose duty it shall be to forthwith give such notice by mail to all persons known to have or claim an interest in such property, and to such persons as the court may by order direct, of the time and place at which he will appraise such property, and at such time and place to appraise the same and make a report thereof, in writing, to said court, together with such other facts in relation thereto as said court may by order require to be filed with the clerk of said court; and from this report the said court shall, by order, forthwith assess and fix the market value of all inheritances, devises, bequests and other interests, and the tax to which the same is liable; and shall immediately cause notice thereof to be given by mail, to all parties known to be interested therein.”

Section 15 provides in substance that if the tax be not paid according to law the Attorney General shall cause the person interested to be cited and that he shall prosecute proceedings in the probate court for the collection of the tax.

It is a mistake to assume that the proceedings to appraise the property so as to fix the amount of the tax is necessarily an adversary proceeding between the State and the person who owes the tax on the inheritance, for Section 13 expressly provides that proceedings may be instituted by any interested party or by the Attorney General, or by the probate court on its own motion, and there is no provision for notice to the Attorney General

where the proceeding is not instituted by that officer. The amount of the tax is assessed according to the statutory plan, which does not contemplate an adversary proceeding, except in the case of delinquency, where the Attorney General is required to act by instituting proceedings against the delinquent. When the amount of the tax is assessed according to the statutory plan it becomes the duty of the party to pay the amount into the State treasury, and if he fails to do so within the time prescribed by law, that is to say within twelve months after the death of the former owner, then the Attorney General is required to act, and he is not required to do so except after there has been a failure to pay within the time prescribed.

While the plan prescribed in Section 13 for the appraisal of the inheritance does not contemplate notice to the Attorney General, yet the State is in fact represented by the assessing officer or tribunal, which is the county court. Whether or not the Attorney General is authorized to prosecute an appeal from an assessment made by proceedings to which he is not a party we need not now decide, as the question is not presented.

We are of the opinion that the circuit court correctly held that the judgment of the probate court was a valid exercise of that court's jurisdiction.

Affirmed.

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FOSTER v. BAYOU METO DRAINAGE DISTRICT.

KENTARK LAND & TIMBER COMPANY v. BAYOU METO  
DRAINAGE DISTRICT.

Opinion delivered January 28, 1918.

**DRAINAGE DISTRICTS—ASSESSMENTS—RIGHT OF APPEAL.**—Under the act of 1909, page 829, as amended by the act of 1913, page 738, providing the formation of drainage districts, a land owner may test the correctness of the assessment of his property by an appeal, taken within the time prescribed, whether he has actually appeared prior to that time or not.

Appeal from Lonoke Circuit Court; *T. C. Trimble*, Judge; reversed.

*Charles A. Walls*, for appellants.

All the land owners were parties to the suit. No written complaint was necessary and the right to appeal is absolute under the Act. Kirby's Digest, § 1487; Acts 1913, 738; 34 Ark. 240; 51 *Id.* 159; 77 *Id.* 586; 95 *Id.* 385; 117 *Id.* 4; 91 *Id.* 81; 90 *Id.* 219; 117 *Id.* 292; 126 *Id.* 211; 122 *Id.* 255, etc. See also, 43 Ark. 33; 35 *Id.* 298; 100 *Id.* 496; 101 *Id.* 106.

*Geo. M. Chapline* and *W. P. Beard*, for appellee.

Appellants failed to comply with the Act. No complaint was filed and appellants did not make themselves parties to the record and hence there could be no appeal. Kirby's Digest, § 5976; 71 Ark. 84. See also 52 Ark. 502; 90 *Id.* 195; 100 Md. 381; 112 Pac. 234; 93 *Id.* 28.

**McCULLOCH, C. J.** A drainage district designated as Bayou Meto Drainage District No. 1 of Lonoke County, Arkansas, was duly organized by an order of the county court of Lonoke County, embracing a large area which included lands of each of the appellants Foster and Kentark Land & Timber Company. Each of said parties appealed to the circuit court of Lonoke County from the order and judgment of the county court confirming the assessment of benefits made by the commissioners. The circuit court dismissed each of the appeals on motion of the commissioners of the district and appeals have been prosecuted to this court.

Learned counsel for appellees defend the ruling of the court on the ground that appellants did not make themselves parties to the record in the county court by appearing and filing a written complaint against the correctness of the assessment. The contention is that under the statute an owner of land assessed must appear and make himself a party by filing a written complaint before he can appeal from the court's action in confirming the assessment. The proceedings were conducted pursuant to Act

No. 279 of the session of 1909 (Acts of 1909, p. 829) as amended by the Act of March 13, 1913, (Acts of 1913, p. 738) popularly known as the "alternative system" of forming drainage districts. The validity of this particular organization was upheld in the recent case of *Jones v. Fletcher*, 132 Ark. 328. The statute provides that the organization shall be affected by an order of the county court made after notice to land owners and that any owner of real estate within the district may appeal from the order within twenty days after the same has been rendered. It provides further that after the formation of the plans for the improvement the commissioners shall assess the benefits to the property in the district and file the assessment list with the county clerk, and that the clerk shall give notice thereof by publication in a newspaper. The amendatory act of 1913 contains the following provision with respect to the proceedings in the county court at the hearing and confirmation of the report of the commissioners and appeals therefrom:

"Any owner of real property within the district who conceives himself to be aggrieved by the assessment of benefits or damages or deems that the assessment of any land in the district is inadequate, shall present his complaint to the county court at the first regular, adjourned or special session, held more than ten days after the publication of said notice; and the said court shall consider the same and enter its findings thereon, either confirming such assessment or increasing or diminishing the same; and its finding shall have the force and effect of a judgment, from which an appeal may be taken within twenty days, either by the property owners or by the commissioners of the district."

It was clearly the purpose of the law-makers to treat each property owner as a party to the record so far as it affected the assessment on his property, and to give him the right of appeal at any time within twenty days after the final order of the court confirming the assessment. It is true that the statute gives each property

owner the right to appear in the county court and make his complaint and have a hearing thereon by the court. This does not mean necessarily a written complaint, but the word "complaint" is used as meaning objections, which may be made orally. But whether the land owner appears or not he is given the right, as an aggrieved party, to take an appeal to the circuit court within twenty days.

There is a clause in Section 9 of the Act of 1909, which reads as follows:

"The remedy against such assessment of taxes shall be by appeal, and such appeal must be taken within twenty days from the time that said assessment has been made by the county court, and on such appeal the presumption shall be in favor of the legality of the tax."

The provision just quoted emphasizes the view that the intention was to give the land owner the right to test the correctness of the assessment of his property by an appeal taken within the time prescribed whether he has actually appeared prior to that time or not. He has no other remedy for relief against an excessive assessment of benefits except by appeal from the order of confirmation. This view of the matter is strengthened by the fact that the section conferring the right of appeal authorizes the county court to increase or diminish the amount of assessments. The statute contains no provision for special notice of an increase of assessments by order of the county court; therefore, unless the property owner is given the right to take an appeal within twenty days, the result would be that his assessment might be increased without an opportunity being given him for a correction.

A consideration of the whole statute convinces us that it gives the right of appeal and that the circuit court erred in dismissing the appeals. The judgment of dismissal in each case is reversed and the cause remanded with directions to overrule the motion and proceed with the hearing of the appeal.

## YOUNG, TRUSTEE v. FOWLER.

Opinion delivered January 28, 1918.

1. **ATTORNEY AND CLIENT—EMPLOYMENT OF ADDITIONAL COUNSEL.**—An attorney has no implied authority to employ additional counsel at the expense of his client, and it is not within the apparent scope of his authority.
2. **ATTORNEY AND CLIENT—EMPLOYMENT OF ATTORNEY—FEES—RATIFICATION.**—Where a litigant knows that his attorney is being assisted in a trial by another attorney, he will not be liable to the latter for a fee, merely because of such knowledge.
3. **ATTORNEY AND CLIENT—EMPLOYMENT OF ATTORNEY—FEES.**—A certain bank becoming insolvent, it was taken over by the State Bank Commissioner and one C. was placed in charge of its assets. At the same time the L. Co. became insolvent and C. was made trustee in bankruptcy of its assets. Appellant, as trustee, purchased the assets of both the bank and the L. Co. Appellee had been employed by the Bank Commissioner, and was paid a fee by him. Appellee also did certain work for appellant, which he alleged was beneficial to appellant, and he sued appellant for a fee. *Held*, under the facts, that appellee had never been employed by appellant, and was entitled to no fee from him.
4. **APPEAL AND ERROR—CHANCERY JURISDICTION—COMPLAINT BY PLAINTIFF.**—Where appellee brought an action in chancery, he can not complain of a decision in equity against him.

Appeal from Benton Chancery Court; *Ben F. McMahon*, Chancellor; reversed.

*Duty & Duty*, for appellants. *W. N. Ivie*, of counsel.

1. This suit was filed under the attorney's lien Act. Acts 1909, p. 892. No cause of action was stated and the demurrer should have been sustained. 65 Ark. 495; 64 *Id.* 510; 103 *Id.* 103. Plaintiff performed no service in the Benton chancery court and had no lien. 27 Ark. 369; 15 S. W. 363; 55 Ark. 546. No relief should have been given, as no equitable jurisdiction was shown. 16 Cyc. 111-127; 37 Ark. 164; 105 U. S. 430; 5 Fed. 665; 10 R. C. L. 373; 139 S. W. 715; 1 Ark. 31; 14 *Id.* 346; 87 *Id.* 206; 73 *Id.* 462; 74 *Id.* 484; 109 *Id.* 274; 92 Fed. 710; 119 U. S. 325; 101 Fed. 329; 106 *Id.* 103; 138 U. S. 146; 221 Fed. 178.



The court was without jurisdiction to render judgment for services in another suit outside the one in which a lien is sought. 66 Ark. 190; 49 S. W. 822.

2. The lien must be enforced in the trial court. 103 Ark. 306.

3. Plaintiff was attorney for the trustee in bankruptcy and not for defendants. 20 Am. Bank. Rep. 22.

4. There was no contract to pay for his services. The law implies no contract to pay because one receives benefits from the services of an attorney, unless he is employed as such. 76 Ark. 115; 5 L. A. Ann. 4818; 20 So. 862; 56 Ark. 382.

5. The bankruptcy court is the only court that has jurisdiction. An attorney cannot bind his client by the employment of another attorney. 6 C. J. 668; 28 Ark. 95; 10 *Id.* 18. There was no ratification. 6 C. J. 669.

6. The jurisdiction was only in the bankruptcy court. 4 Am. Bank Rep. 319; 159 U. S. 575; 113 *Id.* 127; 3 A. & E. Enc. Law (2 ed.), 447-452; 18 Am. Bank Rep. 450.

7. The decree is clearly against the preponderance of the testimony.

*Rice & Dickson*, for appellee.

1. The court had jurisdiction. It properly gave judgment for the fee but improperly refused to declare a lien. 31 Ark. 422; 32 *Id.* 562; 51 *Id.* 259; 16 Cyc. 127-131; 52 Ark. 411. The main purpose of the suit was to enforce a lien, but the finding for the debt was incidental thereto. 56 Ark. 392; 14 *Id.* 346; 76 Va. 12; 49 W. Va. 181; 14 Ark. 50. See also, 34 Ark. 419; 2 Wheat. 290; 98 Iowa 468; 37 Ark. 186; 74 *Id.* 85; 10 R. C. L., § 122, etc.

2. Appellee should have been decreed a lien. 123 Ark. 473; 117 *Id.* 513. Appellee was employed as an attorney; appellant accepted his services and received benefits and also ratified same. A lien should have been declared. 76 Ark. 121; 42 *Id.* 402; 36 *Id.* 591; 4 Cyc. 926; 34 Ga. 382; 4 Cyc. 986, 1008.

MCCULLOCH, C. J. This is an action instituted in the chancery court of Benton County by appellee as a member of a firm of attorneys composed of appellee and W. N. Ivie, against appellant Young as trustee for the Bankers Trust Company of Dallas, Texas, to recover one-half of a fee alleged to have been earned by said firm of attorneys by services rendered in certain litigation prosecuted in that court and in the United States District Court for the Western District of Arkansas at Fort Smith, at the instance and for the benefit of appellant. A lien was asserted on property alleged to have been gained by appellant as a result of said litigation. In the original complaint Mr. Ivie was named as defendant by reason of the dissolution of the firm and his refusal to join in the suit as plaintiff, but in an amended complaint subsequently filed by appellee, Mr. Ivie was joined as plaintiff without his consent. As the suit was prosecuted without the consent, and apparently over the objection of Ivie, he must be and was by the lower court, treated as a defendant in the action. He testified as a witness in the case, and his statement was that his firm was not employed by appellant Young and was not entitled to claim a fee from Young. It is not claimed that there was an express contract as to the amount of the fee, but appellee alleged in the complaint that the value of the service rendered by his firm for appellant Young was the sum of \$35,000, and that he was entitled to one-half of the fee.

Appellant denied that Fowler & Ivie were employed at all by him, or that they rendered any service for his benefit under circumstances from which a contract to pay a fee should be implied. The chancery court decided in favor of appellee as to the right to recover a fee and fixed the amount of his share at \$5,000, but held that he was not entitled to a lien on the property described in the complaint.

The Bank of Rogers, a banking corporation doing business at Rogers, Arkansas, became insolvent, and was taken over by the State Bank Commissioner, who placed a special deputy, Mr. Perry N. Clark, in charge of the

assets of the bank to wind up its affairs, as authorized by statute. Among the assets of the defunct Bank of Rogers were certain second mortgage bonds of the Ozark Land & Lumber Company, another domestic corporation, of the par value of about \$86,000, and also unsecured obligations of said corporation amounting to about \$68,000. The Ozark Land & Lumber Company was operating in Benton County, Arkansas, and its principal assets consisted of 12,500 acres of timbered land and a short line railroad. It, too, became insolvent and was put into bankruptcy by its creditors. Mr. Clark, the Special Deputy State Bank Commissioner, being elected trustee for the estate of the bankrupt. In addition to the bonds of the Ozark Land & Lumber Company held by the Bank of Rogers, there was a prior bond issue of \$150,000 held by certain parties in the East represented by a committee composed of Messrs. Johnson, Bird, Potter and Smith. These bonds were designated as "first mortgage bonds," and when issued constituted a first lien on the assets of said corporation, a mortgage on the property of the corporation having been given to secure the same, but that priority was contested by other creditors on the ground that the holder of the bonds had accepted from the Ozark Land & Lumber Company a large amount of stock in the corporation as a bonus in the purchase of the bonds, and it was insisted by the State Bank Commissioner and other creditors of the Ozark Land & Lumber Company that the holders of the first mortgage bonds should be required to pay for the shares of stock received as a bonus before being allowed priority in their claim against the estate of the bankrupt.

On October 6, 1915, the State Bank Commissioner and Mr. Clark as trustee in bankruptcy of the estate of the Ozark Land & Lumber Company, instituted an action in Benton Chancery Court against the holder of the said first mortgage bonds, alleging that said bondholders had accepted as a bonus from the Ozark Land & Lumber Company shares of stock of the par value of \$150,000, which had never been paid for, and should be treated as a set-off

against the bonds. The prayer of the complaint was that the second mortgage bonds held by the Bank of Rogers be declared a prior lien on the property of the Ozark Land & Lumber Company, which was mortgaged to secure the bonds, and that the lien be foreclosed. Duty & Duty, a firm of attorneys of Rogers, Arkansas, were the regular attorneys for the Bank Commissioner in the management of the affairs of the defunct bank, and they, together with Fowler & Ivie, who were specially employed by the Bank Commissioner, instituted that suit. The holder of the first mortgage bonds appeared in that suit and moved to dismiss it, and on January 4, 1916, the court entered an order staying the proceedings in the suit until the bankrupt court should release the real estate from its jurisdiction. Nothing further was done in that case. The Bank Commissioner, with the approval of the Benton Chancery Court, paid to Fowler & Ivie the sum of \$350, as fee for their services in the above mentioned suit. On January 22, 1916, appellant Young, as trustee for the Bankers Trust Company, of Dallas, Texas, purchased from the Bank Commissioner the undisposed of assets of the Bank of Rogers, including the claims against the Ozark Land & Lumber Company, and the sale was duly confirmed by the Benton Chancery Court, under whose orders the affairs of the bank were being administered. That was the first appearance of appellant or of the Bankers Trust Company in the proceedings, and it has not been shown in the record why the trust company or its trustee made the purchase, or that they were or had been otherwise interested in the affair.

On November 12, 1915, the holders of the first mortgage bonds of the Ozark Land & Lumber Company filed in the bankruptcy court, where the proceedings against that corporation were pending, their claim against the estate of the bankrupt on the bonds held by them, and asked that the claim be allowed as a preferred one. The trustee filed objections to the allowance of that claim, basing his objections on several grounds, one being the same set forth in the complaint of the Bank Commissioner

and the trustee in the suit instituted in the Benton Chancery Court, to the effect that the claimants had accepted, as a bonus, shares of stock of the corporation equal in face value to the amount of the bonds. The trustee also presented a petition to the referee in bankruptcy asking for authority to employ an attorney to represent him in the matter of his objections to the allowance of the claim of the first mortgage bondholder, and stating that he had selected Fowler & Ivie as the attorneys to be so employed, who he stated in his petition had "agreed to prosecute said objections to a determination, conditioned that if enough is not recovered and saved to the estate to warrant allowance and payment of attorney's fees, that they receive no compensation for their services." This petition, it is proved, was presented to the referee after consultation between him and appellee. The referee granted the petition and made an order authorizing the employment of Fowler & Ivie as attorneys to represent the trustee on the terms and conditions named in the petition.

The matter of allowance of the claim of the first mortgage bondholder, and the trustee's objections thereto, came up for hearing before the referee and the objections of the trustee were sustained and the claim was disallowed. The claimants brought the matter before the Federal District Court for review and the court reversed the order of the referee and allowed the claim. An appeal was prosecuted from that judgment to the Circuit Court of Appeals and the cause was pending there on appeal when the present case was tried below. Fowler & Ivie represented the trustee in those proceedings in accordance with the employment authorized by the referee. The record shows that they appeared only for the trustee. Neither appellant Young nor the Bankers Trust Company of Dallas appeared as parties to the proceedings. The trustee presented a petition to the bankruptcy court for sale of the bankrupt estate. This was done in February, 1916, but nothing was done in the matter until September, 1916, when the interested parties appeared before the court and agreed upon a sale of the property to

appellant Young as trustee for the price of \$180,000, which included the sum of \$5,000 expressly mentioned as a sum to cover the expenses of administering the estate. The sale was recommended by the referee and the court made an order authorizing it and afterward approved the sale. The order of approval was rendered by the court on October 11, 1916. The sale was approved by the court on condition that the proceeds of the sale be held subject to the determination of the controversy over the allowance of the claim of the first mortgage bondholder, the proceeds of sale to stand in place of the property on which the bondholder asserted a prior lien. Appellee contends that his firm represented appellant by special employment, as well as the trustee in bankruptcy, throughout the proceedings in the Federal court, and that appellant made a profit of more than \$200,000 on the purchase of the property. He took that fact into account in fixing the amount of his fee. Immediately after the consummation of the sale appellee made request of appellant for payment of the fee which he claimed for his firm, and upon appellant's refusal or failure to pay he instituted this action.

The contention of appellee is that the findings of the chancellor in his favor can be sustained on either of three grounds: (1) That there was an express contract between appellant and appellee for the employment of his firm; (2) that appellant accepted the benefit of the firm's services under circumstances from which a contract to pay will be inferred; and (3) that appellant, with full knowledge of the acts of his attorneys, Duty & Duty, in employing appellee's firm, ratified the same.

The findings of the chancellor in appellee's favor were general, so each of the grounds must be examined to ascertain whether or not either is sustained by the evidence.

A finding in appellee's favor that there was an express contract of employment is clearly against the preponderance of the evidence. The testimony of appellee himself is substantially all there is in support of his con-

tention on that issue. The testimony of witness Clark (the trustee in bankruptcy) does not tend to establish an express contract, except as a circumstance, for he only knows that appellee's firm performed services in the case in the Benton Chancery Court, and in the bankruptcy proceedings, in connection with Duty & Duty, the attorneys who were employed by the Bank Commissioner, as well as by appellant. The performance of those services were, however, entirely consistent with the contention of appellant that Fowler & Ivie were representing the Bank Commissioner and the trustee in bankruptcy, and that he did not employ them.

Appellee testified that shortly after appellant purchased the assets of the Bank of Rogers, Mr. J. R. Duty, of the firm of Duty & Duty, who were the attorneys for appellant, employed the firm of Fowler & Ivie to continue in the litigation as appellant's attorneys. Mr. Duty denied that statement in his testimony, and stated that he merely told appellee that if the firm of Fowler & Ivie continued in the litigation pending in the Federal court and there was a recovery, he (Duty) would recommend to the court an allowance of a liberal fee. He says that he stated to appellee at the time that he had not consulted his clients as to that matter, and he also testified that he never informed his client of his conversation with appellee. It should be remembered that at that time the suit in the Benton Chancery Court was at an end, and the only litigation then pending in the Federal court was between the first mortgage bondholders and the trustee in bankruptcy as the representative of all the creditors of the bankrupt corporation. Appellant was not a party in either case. It is true that he was the principal creditor, and to that extent he was interested more than any one else, but he had the right to stand behind the trustee who represented all of the creditors without personally appearing in the litigation. Personal liability for payment of the fee could not be imposed upon him without his consent merely because he was the principal beneficiary. Mr. Ivie testified that his firm was not employed by appellant and that

they appeared in the litigation in the Federal court only as attorneys for the trustee. The undisputed evidence is that Fowler & Ivie appeared in the proceedings only as the attorneys for the trustee, and that they did so under an express agreement that they were not to receive any fee unless there was a recovery. Appellant testified that he did not employ appellee's firm and had no information that they had been employed by Mr. Duty, or that they were acting for him in the litigation.

(1) It is undisputed that appellant did not come to Arkansas until October, 1916, when he came to close up the purchase of the Ozark Land & Lumber Company property, and that he had no actual notice that Fowler & Ivie had been employed as his attorneys, or that they were acting as his attorneys. An attorney has no implied authority to employ additional counsel at the expense of his client, and it is not within the apparent scope of his authority. *Danley v. Crawl*, 28 Ark. 95; 1 Thornton on Attorneys, § 210.

We are of the opinion, therefore, that a finding in appellee's favor that he was employed by appellant, if such was the finding of the court, is against the clear preponderance of the testimony, and can not be sustained. It may be said that all of the witnesses who testified on that issue were, in a measure, interested ones, either directly or indirectly; but conceding that to be true, none are more interested in the result of this litigation than appellee himself, nor even as much, and appellee's unsupported testimony can not be held to be preponderating because of the indirect interest of the witnesses on the other side of the controversy. Treating the testimony as all of a kind—that is to say, the testimony of interested witnesses—that does not increase the comparative force of appellee's testimony so as to attribute to it preponderating effect.

(2-3) Nor will a contract to pay a fee be implied in this case from the fact that appellee's firm performed services in the Federal court litigation which resulted, or may result in benefit to appellant. This is so for the rea-



son, among others, that Fowler & Ivie performed the services under an express contract with the trustee, and their services are referable to that contract. *Davis v. Trimble*, 76 Ark. 115.

Neither was there a ratification of the employment of appellee's firm, if they were employed or assumed to act in the interest of appellant. The services performed by appellee's firm were consistent with and referable to their contract with the trustee, and appellant had no actual notice that they were assuming to act for him. Under those circumstances, there was no ratification. *Davis v. Trimble*, *supra*; *Bank of Batesville v. Maxey*, 76 Ark. 472; 1 Thornton on Attorneys, § 213. "But the mere failure expressly to disavow the acts of an attorney will not, in itself, be a conclusive ratification thereof," said Mr. Thornton in the above citation, "thus it has been held that knowledge by a client that his attorney is being assisted by associate counsel is not enough to show that the client ratifies the employment, on his behalf, by his counsel of such attorney; such assistance being consistent with the employment of the attorney to assist the counsel at the latter's expense."

Appellee rendered his services in the Federal court under an express contract with the trustee in bankruptcy for a contingent fee, based on the final recovery for his client. That litigation had not been finally determined in the Federal Court of Appeals, and appellee had by his own admission abandoned the further prosecution of the appeal. He must abide his contract, and can not under the circumstances of this case claim a fee from appellant merely because the latter may have received benefit from the litigation, or has reaped profit from the purchase of the assets of the bankrupt corporation.

(4) The findings of the chancellor on the issues of fact being against the preponderance of the testimony, it is unnecessary to discuss the question raised as to the cause being improperly tried in the chancery court instead of the circuit court. Appellee having invoked the aid of the chancery court in the trial of the issue, he can not com-

plain of a decision against him. *Cribbs v. Walker*, 74 Ark. 104.

The decree is, therefore, reversed and the cause is dismissed.

HUMPHREYS, J., not participating.

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WALES-RIGGS PLANTATIONS v. GROOMS.

Opinion delivered January 28, 1918.

1. **PRINCIPAL AND AGENT—AUTHORITY OF AGENT—PROOF.**—The authority of an agent to bind his principal will not be presumed and can not be proved by the mere acts and declarations of the agent in assuming authority. The authority of an agent must be shown by positive proof or by circumstances that would justify the inference that the principal had assented to the acts of his agent.
2. **PRINCIPAL AND AGENT—SCOPE OF AUTHORITY.**—Under the testimony, *held*, that an employee upon appellant's plantation was without authority to pursue a mule which had strayed from the plantation, and incur expense in retaking the mule, by proceedings in replevin.

Appeal from Greene Circuit Court; *R. H. Dudley*, Judge; reversed.

*S. R. Simpson*, for appellant.

Kepley was not the agent of appellant, had no authority to go after the mule, nor borrow money to pay expenses. Appellant is not liable. 105 Ark. 111; *Ib.* 446; 53 *Id.* 208; 92 *Id.* 315; 111 *Id.* 345; 113 *Id.* 190; L. R. A. 1915 A, 686; 126 Ark. 405.

*W. S. Luna* and *Jeff Bratton*, for appellee.

The instructions are correct. The evidence is legally sufficient. Kepley was acting within the scope of his agency. 82 Ark. 503; *Mechem on Agency* (1 ed.), § 167, p. 109; 124 Ark. 360; 117 *Id.* 176; 111 *Id.* 229.

STATEMENT OF FACTS.

This appeal is from a judgment in favor of the appellee for \$29.35, which sum was advanced by the appellee to one E. W. Kepley. The facts are substantially as follows:

E. W. Kepley was an employee of the Wales-Riggs Plantations. He was employed by C. W. Riggs, the president and manager of the appellant. When the appellee first met Kepley he was in Greene County looking for a stolen mule, and he asked the appellee to sign a check for him to pay the expenses of getting the mule back to Earle, near which place the corporation owned a plantation. The mule belonged to the corporation. Kepley was a stranger to the appellee, but he endorsed the check for him and enabled him to secure the \$25. Kepley was a farm hand, sent to Cross County to work on the Riley place, belonging to appellant. The testimony shows that he was sent with a car load of mules, tools and seed to farm a part of the Riley place, and was commended in a letter by the appellant as a young man of good morals and a good business man generally and worthy of the usual business courtesies.

The mule escaped from the Riley place and was pursued by Kepley and found by him in possession of one J. A. Sparks, in Greene County, about ninety miles away from appellant's plantation near Earle. The money which the appellee advanced to Kepley was to enable him to pay the expenses incident to the recovery of the possession of the mule, which Kepley did by suit in replevin.

The appellee, among other things, testified that Riggs, the president and manager of appellant, told him that he had hired Kepley and sent him to cultivate the Riley farm; that he had sent him with a car load of mules and tools. Riggs refused to pay the check, his reason being that he "just had Kepley hired." He told appellee that Kepley had no authority on earth to pursue a mule that had escaped or to incur one cent of expense on that account, and "denied liability."

The above states the facts in the most favorable light for the appellee. The testimony on behalf of the appellant was to the effect that Kepley had no authority to contract any debt for appellant corporation; that he was not under any obligation to go to Greene County to hunt for or recover possession of a mule, and that he had no au-

thority whatever to do so. If he did so he went without the appellant's authority or consent. He was never at any time the agent of the appellant and never had any authority to make any contracts or obligations against the appellant. He was simply a farm hand, sent to Cross County to work on the Riley place temporarily at general farm work, such as plowing and planting the spring crops. His contract with appellant was in writing. The contract was introduced in evidence, and it shows, in effect, that Kepley was employed to work by the day at the sum of \$1.15 per day, at any kind of work that appellant had for him to do, and if the work continued longer than one day it was to be at the same wage. If Kepley worked for one year he was to have \$15 per month extra.

The appellant asked for a peremptory instruction, which the court refused, and gave instructions submitting the issue to the jury as to whether Kepley was the agent of the appellant, and whether he acted within the scope of his authority as such agent in borrowing the money advanced to him by the appellee.

WOOD, J., (after stating the facts). The court erred in not granting appellant's prayer for an instruction directing a verdict in its favor. The testimony did not raise an issue of fact to be determined by the jury, for it does not tend to prove that the act of Kepley in borrowing money from the appellee was in the scope of his authority as an employee of the appellant.

Even giving the testimony its strongest probative force in favor of the appellee, it does not tend to prove that Kepley was the agent of the appellant, clothed with authority, express, implied or apparent, to borrow money from the appellee with which to pay the expenses incident to the recovery of the possession of a mule that had escaped from appellant's plantation. While there is some testimony tending to show that Kepley was entrusted by the appellant with a car load of mules, tools, etc., which were sent to cultivate the Riley place, owned by appellant in Cross County, Arkansas, this testimony does not tend

to prove that Kepley had authority, express, implied or apparent, to follow one of these mules when the same had escaped from the plantation, for a distance of some ninety miles, and to institute replevin suit for the same and to incur expenses as the agent of the appellant in the recovery of its possession. It is not even shown by the appellee that Kepley represented himself as the appellant's agent when he borrowed the money from the appellee; but even if Kepley had made such representations to the appellee, the appellant would not have been bound by them. The authority of the agent to bind his principal will not be presumed and can not be proved by the mere acts and declarations of the agent in assuming authority. The authority of an agent must be shown by positive proof or by circumstances that would justify the inference that the principal had assented to the acts of his agent. *Daly v. Arkadelphia Milling Co.*, 126 Ark. 405; see, also, *Wales-Riggs Plantations v. Dye*, 105 Ark. 446.

For the error in refusing to grant appellant's prayer for an instruction directing the jury to return a verdict in its favor the judgment is reversed and the cause is dismissed.

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CRAMER v. REMMEL.

Opinion delivered January 28, 1918.

1. **BONA FIDE PURCHASER—LAND.**—For a *bona fide* purchase of land, three elements are essential, viz: a valuable consideration, the absence of notice, and the presence of good faith.
2. **BONA FIDE PURCHASER—PURCHASE BY QUITCLAIM DEED.**—A purchaser by quitclaim deed may occupy the position of innocent purchaser.
3. **LIS PENDENS—FAILURE TO FILE NOTICE.**—A suit affecting the title or any lien on any real estate is not *lis pendens* until a notice of the pendency of the action is filed in accordance with the statute.
4. **BONA FIDE PURCHASER—LAND.**—Appellee held to be a *bona fide* purchaser of land, where he paid full value for the same, and the record title appeared to be good, and this was not affected by the fact that he took under a quitclaim deed.

Appeal from Arkansas Chancery Court; *John M. Elliott*, Chancellor; affirmed.

*Harnwell & Young*, for appellants.

1. Thane never had any title to the lots. They were deeded to him as *trustee* and he conveyed to Remmel in his individual capacity by a quitclaim deed. Such a deed is always suspicious. The deed to Thane was only a mortgage, and the debt had been paid. Neither Thane nor the bank had anything to convey to Remmel, and the quitclaim deed conveyed nothing, as Remmel had notice and the mortgage debt had been paid. Remmel's only remedy was to sue Thane or the bank for the money he paid.

Cramer held valid deeds from the Price heirs. The burden was on Remmel, and he has failed. Cramer paid more than the property was worth, and Remmel knew Cramer bought the lots. A quit-claim deed conveys no title. The property was in litigation and Remmel is charged with notice of the *lis pendens*.

2. Cramer is not estopped. 39 Ark. 131; 48 *Id.* 409; 50 *Id.* 128; 94 *Id.* 141, 107.

The real title was never in Thane; he was merely a trustee, and when the trust was ended the property reverted to the grantee of the Price heirs, Cramer. The Thomas deed to Thane and Thane's deed to Remmel are nullities. The decree should be reversed and Remmel's deed quashed.

*Wallace Townsend*, for appellee.

1. Remmel's record title is perfect, and he had a right to rely on it as an innocent purchaser, without notice, for a valuable consideration and acting in good faith. 120 Fed. 819; 131 *Id.* 668; 200 U. S. 321; 44 Ark. 153; 118 *Id.* 516; 122 *Id.* 445. The three essentials of an innocent purchaser are met; valuable consideration, absence of notice and good faith. 95 Ark. 582. Cramer has no title and there is no showing that he ever paid any consideration.

2. Cramer is estopped. 39 Ark. 131; 48 *Id.* 409; 94 *Id.* 141-146, 107-110.

3. *Lis pendens* has been abrogated by statute. 122 Ark. 445; 118 *Id.* 139; 123 *Id.* 532; Kirby's Digest, § 5149.

4. A purchaser must take notice of all prior recorded instruments. 87 Ark. 490-2; 84 *Id.* 1; 39 Cyc. 1727.

5. The findings of the chancellor will not be disturbed unless clearly against the preponderance of the evidence. 122 Ark. 600, 604. The decree should be affirmed, because (1) Thane had the real legal title and passed it to Remmel; (2) Remmel was an innocent purchaser for value, in good faith; (3) Cramer is estopped.

#### STATEMENT OF FACTS.

On the 17th day of July, 1915, H. L. Remmel instituted this action in the chancery court against D. L. Cramer and others to quiet his title to seventy-eight lots in the city of Stuttgart, Arkansas County, Arkansas. The material facts are as follows:

N. B. Price died intestate owning the lots in controversy, as well as numerous other lots, and several tracts of land. He left surviving him five children, who were his sole heirs at law. Among them were two married daughters, viz: Myrtle Kimberlin and Maude P. Quilling. Maude Quilling was the wife of M. W. Quilling, Jr. Maude P. Quilling was engaged in business which her husband managed for her. She mortgaged her part of the estate to the Desha Bank & Trust Company to secure an indebtedness of several thousand dollars, which she owed the bank. Henry Thane was the president of the bank and acted for it in the transaction with the Quillings. Partition was had of the estate. Maude P. Quilling and her husband wished to purchase the interest of Myrtle Kimberlin, which involved most of the seventy-eight lots in controversy in this suit. Henry Thane, for the Desha Bank & Trust Company, agreed to advance one thousand dollars for the purchase of Myrtle Kimberlin's interest in the estate of N. B. Price, deceased. It was agreed between the parties that Myrtle Kimberlin should deed her

interest in the estate direct to Henry Thane, in trust for the Desha Bank & Trust Company. At the same time Maude P. Quilling deeded several lots to Henry Thane in trust for the Desha Bank & Trust Company. A part of the understanding between the parties was that the transaction should be in the nature of a mortgage and would be additional security to the Desha Bank & Trust Company for what Maude P. Quilling owed it. It was understood that Thane should first be repaid the thousand dollars purchase money of the lots and that the amount over that received for the lots should be applied towards the payment of the indebtedness to the bank. The Quillings were to have charge of the sale of the lots and Thane was to make deeds to the lots to the persons to whom they sold them. The deed from Myrtle Kimberlin to Henry Thane was executed on February 20, 1908, and was duly filed for record. This conveyance embraced nearly all of the lots in controversy. On October 5, 1909, Maude P. Quilling conveyed a few of the lots in controversy to Henry Thane. Both of these deeds were quitclaim deeds. On the 26th day of August, 1912, the Desha Bank & Trust Company and Henry Thane, trustee, instituted an action in the chancery court against M. W. Quilling, Jr., and Maude P. Quilling, asking for a judgment against the defendants for the balance due the bank and for foreclosure of the mortgage given to secure the same. The chancellor entered a decree in this cause on the 10th day of September, 1914, for the balance due the bank by the Quillings, and held that the deed from Myrtle Kimberlin to Henry Thane, trustee, was a mortgage to secure the sum of one thousand dollars to the Desha Bank & Trust Company. The Quillings moved to Little Rock and became indebted to H. L. Rummel in the sum of \$385 for house rent. On April 23, 1913, M. W. Quilling, Jr., gave Rummel an order on D. L. Cramer for that sum to be paid out of the sale of property of the Quillings in the city of Stuttgart. On May 29, 1913, Cramer wrote a letter to Rummel in which he accepted the order. In the meantime, Rummel had become interested in the purchase of



the lots in controversy. Thus far the facts are practically undisputed; but from this point on there is a direct conflict in the testimony of Remmel and Cramer.

According to the testimony of H. L. Remmel, M. W. Quilling, Jr., told him there was a deed for these seventy-eight lots executed by Henry Thane, at the Bank of Commerce in Little Rock and a draft for \$2,500; that the name of the grantee was left blank in the deed by Henry Thane and Quilling had the authority to fill in the blank by inserting the name of the person to whom he should sell the lots. Remmel had an abstractor in Little Rock to examine the title to the lots and was informed that the title was in Henry Thane and that he had a good title thereto. On May 3, 1913, an attorney of Stuttgart, Arkansas, wrote to D. L. Cramer that he thought the title to the lots in controversy in Henry Thane was good. This letter was shown to Remmel. On May 28, 1913, Remmel paid the draft for \$2,500. M. W. Quilling, Jr., negotiated the sale of the lots to Remmel, and the deed from Thane to Remmel was executed and delivered to Remmel at his request. Quilling gave the Bank of Commerce a written order to deliver the deed to Remmel. Remmel said that Cramer knew all about the negotiations between him and Quilling and assisted Quilling in making the sale to him. He also testified that he thought Cramer went with him and Quilling to the bank to direct that the deed should be turned over to him; that he did not know until months afterwards that Cramer claimed any interest in the lots; that he paid full value for the lots and believed that he was getting a good title thereto. The deed to Remmel was a quitclaim deed, and was filed for record on June 18, 1913.

Henry Thane corroborated the testimony of Remmel as to the execution of the deed and the payment of the draft by Remmel. He testified that the \$2,500 paid by Remmel was received and credited by the Desha Bank & Trust Company to the credit of Quilling; that the deed in question was made at the request of M. W. Quilling, Jr.; that the sale to Remmel was the main sale of any

property that came from Mrs. Kimberlin and with the possible exception of an eighty-acre tract was the first sale from the Kimberlin interest; that M. W. Quilling, Jr., was the agent for his wife and that he transacted all her business with him as such agent.

D. L. Cramer lived in Little Rock and was a real estate agent. According to his testimony, M. W. Quilling, Jr., became indebted to him and they executed an agreement concerning the lots in controversy as follows:

“Little Rock, Ark., April 9, 1913.

“This agreement made this day by M. W. Quilling, Jr., and D. L. Cramer is as follows: M. W. Quilling, for Maude Quilling and himself, agrees to sell to D. L. Cramer sixty-six lots which are held by mortgage by the Bank of Commerce, at Stuttgart, Ark., at the price of \$35 per lot. Thirty-four (34) lots held by bank in Little Rock, Ark., at \$20 per lot, and seventy-eight lots held by Henry Thane at \$35 per lot, providing satisfactory arrangements can be made by D. L. Cramer for the payment of present indebtedness on said lots or for release of title.

“D. L. Cramer.

“M. W. Quilling, Jr.”

On September 30, 1913, M. W. Quilling, Jr., and Maude P. Quilling executed a quitclaim deed to Cramer to these lots. On October 7, 1913, Myrtle Kimberlin executed a quitclaim deed to him to the lots. Cramer denied that he went to the bank with Remmel and Quilling when the latter directed the bank to turn over to Remmel the deed executed to Henry Thane. Cramer also denied that he had anything to do with the sale of the lots to Remmel. He stated that he and Remmel contemplated buying together all the lots owned by the Quillings in the city of Stuttgart, and having a sale thereof for their joint interest; that Remmel, after his purchase of the lots in controversy, declined to go any further with their venture. Other facts will be stated or referred to in the opinion.

The chancellor found the issues in favor of Remmel and a decree was entered accordingly. The defendant Cramer has appealed.

HART, J., (after stating the facts). (1-2) In *Manchester v. Goeswich*, 95 Ark. 582, it was held that the essential elements of a *bona fide* purchase of land are three, viz: a valuable consideration, the absence of notice, and the presence of good faith.

In *Moore v. Morris*, 118 Ark. 516, the court held that the mere fact that there is a holding under a quitclaim deed does not defeat the claim of an innocent purchaser. The court said: "That fact is merely considered as a circumstance in determining whether or not the purchaser was in fact innocent of knowledge of any adverse claim, but the purchaser may show, notwithstanding the form of conveyance, that he was in fact without any information of any other claim of ownership." See also *The Henry Wrape Co. v. Cox*, 122 Ark. 445. Tested by these principles of law, as applied to the facts of the present case, we think the decision of the chancellor was correct.

(3-4) In the foreclosure suit of the Desha Bank & Trust Company against Quilling, the chancellor held that the conveyance by Myrtle Kimberlin to Henry Thane, trustee, was intended as a mortgage and upon appeal to the Supreme Court the decree of the chancellor was affirmed. *Desha Bank & Trust Co. v. Quilling*, 118 Ark. 114. Neither Rummel nor Cramer were parties to that suit, and of course are not bound by the decree in that case. However, the record in the present case shows the transaction to have been intended as a mortgage. The Desha Bank & Trust Company furnished the Quillings one thousand dollars with which to purchase the interest of Myrtle Kimberlin. It was agreed that the deed should be made direct from Myrtle Kimberlin to Henry Thane, as trustee for the bank. The deed was intended as security not only for the purchase price of one thousand dollars but for the other indebtedness of the Quillings to the bank. M. W. Quilling, Jr., was to have charge of the sale of the lots and Thane was to execute deeds to the purchasers as directed by Quilling and to receive the purchase money and credit it on the indebtedness of the Quillings to the bank. This was done in the present case.

Quilling made the sale to Remmel and in writing directed the deed from Thane to be delivered to him. It is true the deed was a quitclaim one, but Remmel paid full value for the lots and the amount so paid by him was credited on the indebtedness of the Quillings to the Desha Bank & Trust Company. The legal title to the lots was in Henry Thane and Remmel paid full value for them in ignorance that there was any other claim to the lots. He testified that he thinks that Cramer went with him and Quilling to the bank to have the deed from Thane to the lots turned over to him. It is true Cramer denies any active participation in the sale to Remmel, but the record shows that he knew Remmel was purchasing the lots and paying full value for them. During the period of the negotiation Cramer received a letter from his attorney at Stuttgart stating that he thought that the title to the lots was in Henry Thane. Other letters written by Cramer during the negotiation tends to show that he knew that Remmel was trying to purchase the lots. He admits that he stated after the sale had been completed that he told Remmel that he thought his title to the lots was good. In explanation he states, however, that he was relying upon information given him by his attorney at Stuttgart before the sale was completed and that he afterwards made an investigation on his own account and came to the conclusion that Remmel's title was inferior to his own. Cramer contends that it was the intention of Remmel and himself to purchase all the lots owned by the Quillings at Stuttgart and to sell them for their joint benefit; that Remmel declined to go further with the transaction after he had completed the purchase of the lots in question and acted in bad faith with him. That was a collateral transaction, and we have nothing to do with it in the decision of the present case. We think the record shows that Remmel was a *bona fide* purchaser of the lots in question and paid for them all that they were worth. He testifies positively that he did not know of the claim of Cramer to the lots. He purchased the lots at the instance of Quilling, and neither Quilling nor Cramer ever

disclosed to him that Cramer claimed any interest in the lots. It is true that the written contract between Quilling and Cramer relative to the purchase of the lots by Cramer was executed before Remmel purchased the lots, but this contract was not of record, and, as we have already seen, Remmel purchased the lots without knowing anything about its existence. There was a perfect record title in his grantor, and under the circumstances of this case he will be deemed to be an innocent purchaser and protected as such although he took from his grantor by a quitclaim deed. *Case v. Caddo River Lbr. Co.*, 126 Ark. 240.

No notice of the pendency of the case was filed in accordance with the statute in the foreclosure suit of the Desha Bank & Trust Company against M. W. Quilling, Jr., and Mrs. Maude P. Quilling. Therefore, Remmel had a right to rely upon the record title, notwithstanding the pendency of this suit in the Arkansas Chancery Court.

In the case of *The Henry Wrape Co. v. Cox*, 122 Ark. 445, the court said: "The common law and equity rule of *lis pendens* has been abrogated in this State by statute. Since the passage of the statute a suit affecting the title or any lien on real estate is not *lis pendens* until a notice of the pendency of the action is filed in accordance with the statute."

The decree will be affirmed.

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BRIDGES (HANEY) v. HANEY.

Opinion delivered January 28, 1918.

1. **APPEAL AND ERROR—REPLEVIN—EXCEPTIONS CAN NOT BE SAVED FOR ANOTHER.**—In an action in replevin the plaintiff testified that she had no interest in the cotton involved, but one F. asked to be allowed to intervene but permission was refused by the court, but F. saved no exceptions and filed no motion for a new trial. Plaintiff, however, did save exceptions and made the court's action toward F. a ground for a new trial. *Held*, plaintiff could not act for F., and that her attempt to do so was unavailing.

2. **APPEAL AND ERROR—ADMISSION OF DEBT, JUDGMENT AND COSTS.**—Where defendant in an action for money admits the debt, but refuses to tender payment, a judgment for the same and costs, against the defendant, is proper.

Appeal from Lawrence Circuit Court, Eastern District; *Dene H. Coleman*, Judge; affirmed.

*W. E. Beloate*, for appellant.

1. The question of ownership was one of fact for the jury. If Fender was to collect and credit upon a debt due by appellant to him, he would be a mere agent and the suit was properly brought in her name. Bliss on Code Pl., § § 56-8. Mrs. Haney was the only proper plaintiff and entitled to relief. 48 Ark. 355. Fender had a mortgage on the land. He should have been made a party. 74 Ark. 54; 49 *Id.* 100.

2. Instructions 4 and 5 are inconsistent. Pearl Haney's intervention should have gone to the jury. 49 Ark. 100.

*W. P. Smith* and *G. M. Gibson*, for appellee.

1. The court properly refused to make Fender a party. Pearl Haney had no interest in the cotton, and was not the proper party plaintiff. Kirby's Digest, § 5999; 5 Ark. 93; 39 *Id.* 172; 36 *Id.* 561; 48 *Id.* 355; 92 *Id.* 215. Fender took no appeal and is not now complaining. He was not a necessary party. 49 Ark. 100.

2. The assignment of the interest of the landlord in a crop does not carry the lien. 31 Ark. 597; 36 *Id.* 561.

3. There is no inconsistency in instructions 4 and 5. Pearl Haney had no interest in the rent. She should have asked a specific instruction if she had any rights. 78 Ark. 100; 102 *Id.* 588; 104 *Id.* 322.

4. There is no error in the instructions and the verdict is supported by the evidence.

#### STATEMENT OF FACTS.

These are companion cases and resulted from the same transaction. The same statement of facts will be necessary to determine the issues in the appeal in each case and one opinion will suffice.

Pearl Haney owned a farm in Randolph County, Arkansas, and Rufe Johnson made a crop of corn and cotton on it on the shares. B. H. Haney, a brother of the husband of Pearl Haney, claiming to have purchased an interest in the crop, gathered a part of the cotton and disposed of it to D. Bloom, a ginner. No. 5021 is a replevin suit instituted by Pearl Haney against Rufe Johnson to obtain possession of the cotton disposed of by B. H. Haney, or in lieu thereof to obtain judgment for its value. B. H. Haney filed an interplea, in which he claimed the cotton by purchase from Pearl Haney. The case was commenced in the circuit court and was tried before a jury. B. H. Haney and other witnesses for him testified to a state of facts which established his claim to the cotton. Their testimony was the same as in case No. 5022, and will be stated more in detail later.

Pearl Haney testified that she had given her father an equitable mortgage on the rents. It does not appear that this mortgage was ever reduced to writing and filed for record. Her father, D. W. Fender, corroborated her testimony in this respect. Pearl Haney, also, denied that she had sold the cotton to B. H. Haney. Fender admitted that he directed the suit to be brought in his daughter's name. At the conclusion of the testimony Fender asked to be permitted to intervene and claim the cotton as his own. The court refused to grant him permission to file his intervention, and Pearl Haney, the plaintiff in the case, excepted to the ruling of the court and in her motion for a new trial assigned as error the action of the court in refusing to allow Fender to file his intervention.

In No. 5022, B. H. Haney sued D. Bloom and the Lawrence County Bank on a check given him by Bloom on the bank. The facts in this case are that B. H. Haney, claiming to have purchased it from Pearl Haney and her husband, gathered some cotton grown by Rufe Johnson on the farm of Pearl Haney and sold it to D. Bloom, a ginner, for the sum of \$79.65, and Bloom gave him a check on the Lawrence County Bank for that sum. Haney cashed the check at the Pocahontas State Bank, and in

due course the check was presented to the Lawrence County Bank for payment. In the meantime Pearl Haney had notified Bloom that she claimed the cotton and Bloom in turn notified the bank not to pay the check. Bloom had at the time sufficient funds in the bank for the payment of the check. The bank refused payment as requested by Bloom and Pearl Haney. The check was protested for nonpayment. The protest fees amounted to \$4.75. After the Lawrence County Bank refused to cash the check, B. H. Haney redeemed it from Pocahontas State Bank. Bloom and the Lawrence County Bank filed a motion in the justice court setting up these facts and asking that Pearl Haney be made a party defendant. The court granted their request, and she entered her appearance to the action. The court, after hearing the evidence introduced by the plaintiff (there being none introduced by the defendants), rendered judgment in favor of the plaintiff for the amount of the check and the protest fees. Pearl Haney appealed to the circuit court. There her father, D. W. Fender, filed an intervention, in which he stated that he was the equitable owner of the cotton and entitled to the proceeds thereof, and especially the check which was the subject-matter of the suit. He alleged that the check was the proceeds of cotton raised on the land of Pearl Haney, and that the cotton had been mortgaged to him to secure a certain indebtedness and that his mortgage included the rents on the land.

On the trial of the case B. H. Haney testified that Rufe Johnson made a share crop on the land of Pearl Haney and that the cotton in question was a part of that crop; that he purchased from Pearl Haney and her husband her interest in the crop before it was gathered and gave them therefor a pair of horses; that he paid full value for the crop at the time and believed he was getting a good title thereto. Other witnesses testified that Pearl Haney admitted to them after the sale that she and her husband had sold her interest in the crop to B. H. Haney for the horses. B. H. Haney gathered a part of the cot-



ton and sold it to D. Bloom for \$79.65, which was its full value.

Pearl Haney testified that she had no interest in the crop; that she had mortgaged her rents to her father for a debt due him, and that the rents belonged to him; that the mortgage was not reduced to writing. Her testimony was corroborated by that of her father. She also denied that she had sold the cotton to B. H. Haney. She stated that her husband sold her interest in the crop to Haney without her knowledge and consent and that he had no authority to do so. In a short time thereafter she and her husband separated.

In case No. 5021 the court told the jury that the undisputed evidence showed that the cotton did not belong to the plaintiff, Pearl Haney, and instructed it to return a verdict for B. H. Haney for possession of the cotton.

In case No. 5022 the court, after giving a short history of the case to the jury said that practically the only question for the jury to determine from the evidence in the case was whether or not at the time the check was given the plaintiff, B. H. Haney, was the owner of the cotton or whether D. W. Fender was the owner thereof and entitled to the money called for by the check. The court further told the jury that the burden of proof was upon B. H. Haney to show that he was the owner of the cotton for which the instruction was given. The court also gave to the jury instructions Nos. 4 and 5. The instructions are as follows:

“4. If you find from the evidence from a preponderance or greater weight of the evidence that it was Haney’s crop, why, he would be entitled to judgment at your hands for the amount stated—there is no controversy about the amount.”

“5. If you believe from the evidence that the cotton was the property of the intervenor, why, it would be your duty to return a verdict for him for the amount claimed. Unless you believe that it was D. W. Fender’s cotton, your verdict should be for plaintiff, B. H. Haney.”

The jury returned a verdict for the plaintiff for the amount of the check and the protest fees.

A separate appeal was taken from the judgment in each case.

HART, J., (after stating the facts). (1) As to the replevin suit No. 5021 but little need be said. Pearl Haney testified that she did not have any interest in the cotton involved in that case and did not claim any interest therein. She was corroborated by the testimony of her father. Therefore, the court properly told the jury that the undisputed evidence showed that she was not the owner of the cotton. But it is claimed by her that the court erred in directing a verdict for the defendant. The basis of this claim is that D. W. Fender at the conclusion of the testimony asked to be allowed to intervene and claim the cotton, and the court refused to allow him to do so. The record shows that at the conclusion of the evidence Fender asked to be allowed to intervene and that the court refused to allow him to do so. Fender saved no exceptions to the ruling of the court and filed no motion for a new trial. Therefore, under the settled rules of this court there is nothing for the court to review as to him. It is true the record shows that Pearl Haney excepted to the ruling of the court in refusing to allow her father to intervene and claim the cotton, and made the action of the court one of the grounds in her motion for a new trial. It is obvious, however, that she could not act for Fender. She suffered no prejudice to her rights by the action of the court in refusing to allow Fender to intervene and there was no error in the court directing a verdict for the defendant.

In No. 5022 it is insisted that the court erred in dismissing the interplea of Pearl Haney and refusing to allow her to have her rights decided by the jury. The record does not show that the court made any order dismissing her interplea. We presume that her contention in this behalf is based upon the instructions given by the court. It will be remembered that the court told the jury

that the only question for it to determine from the evidence was whether or not at the time the check was given B. H. Haney was the owner of the cotton, or whether D. W. Fender was the owner thereof and entitled to the amount of the check. Pearl Haney disclaimed any interest in the cotton and testified that she had mortgaged the rents to her father. He corroborated her testimony. It is obvious, then, that the court did not err in defining the issue to the jury in so far as she was concerned.

(2) It is next contended that instructions numbered 4 and 5 are inconsistent with each other. These instructions are set out in the statement of facts and need not be repeated here. It is evident that all the parties to the action considered the issue to be whether or not B. H. Haney or Fender owned the crop. All the parties agreed that Bloom gave full value for the cotton and that he owed some one for it. Bloom and the bank in their answer admitted that they owed some one for the cotton. They stated that Pearl Haney gave them notice not to pay the amount of the check to B. H. Haney. They asked that they hold the amount due on the check subject to the order of the court. They withheld payment on the check at the request of Pearl Haney, and if they wished to escape judgment for the money and the payment of costs in the action they should have deposited the money in court. It is obvious that they could not hold the money in their hands which they admitted belonged to either Bloom or D. W. Fender and escape a judgment against them for the amount of the check. The right of B. H. Haney to recover depended upon whether or not he had purchased the crop from Pearl Haney. According to his testimony he purchased the crop in good faith from her and paid full value therefor. His right to recover was made to depend upon the truth of his testimony in this regard. Pearl Haney denied that she had made the sale to him, but the jury has settled this disputed question of fact in favor of B. H. Haney. D. W. Fender could have no claim against Haney to the crop, for the mortgage of the rents to him by his daughter was never re-

duced to writing and filed for record as required by the statute. Kirby's Digest, § 5396. Therefore, he acquired no lien superior to the right of B. H. Haney if the latter was a *bona fide* purchaser of the crop.

It follows that the judgment in each case should be affirmed.

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WARMACK v. MAJOR STAVE COMPANY.

Opinion delivered January 28, 1918.

1. **CONTRACTS—PUBLIC UTILITY—ELECTRIC CURRENT—REMEDY OF PATRON—INJUNCTION.**—Appellee had a contract with an electric light company to supply it with current for light; the company held a franchise from the city to furnish current for the city's use. Appellant purchased the assets of the company and refused to furnish current to appellee. *Held*, equity should not order specific performance of the contract, but where appellee had paid for the current an injunction would lie to prevent the cutting off of the supply of current, or if the current had been turned off by the public utility company, a mandatory injunction may be issued to compel it to turn the current on again.
2. **PUBLIC SERVICE COMPANIES—RIGHT TO MAKE SPECIAL CONTRACTS.**—The principle that an electric company, operating under a public franchise, must supply all persons impartially and without discrimination, does not prevent it from entering into reasonable arrangements or agreements with its customers growing out of special circumstances.
3. **CORPORATIONS—SALE OF ASSETS—ASSUMPTION OF DEBTS.**—Where the entire assets of a corporation are transferred, the purchaser is not liable for its debts unless they are assumed. *Held*, in this case that the finding of the chancellor that the purchaser of the assets of an electric light company assumed a special contract to furnish current to appellee, would not be disturbed on appeal.

Appeal from Little River Chancery Court; *James D. Shaver*, Chancellor; modified and affirmed.

*June R. Morrell*, for appellant.

1. The chancellor erred in finding that appellant knowledge of the contract and was bound to carry it out is no allegation to that effect and no proof of it. 43 Ark. 303; 11 *Id.* 134; 29 *Id.* 500.

2. The chancellor's finding that appellant had full knowledge of the contract and was bound to carry it out is against the evidence. 102 Ark. 383; 102 *Id.* 685; 104 *Id.* 475.

3. A purchaser of the property of a corporation is not bound to carry out its contracts. 97 Ark. 106; 86 *Id.* 300; 196 S. W. 49.

*Geo. R. Steel and A. D. Dulaney, for appellee.*

1. All the findings of the chancellor are sustained by the proof. Appellant was the owner of the company and purchased with knowledge of the contract. 92 Ark. 30, 535; 67 *Id.* 200; 73 *Id.* 489; 104 *Id.* 475.

2. Appellant was advised that the company was a corporation, owning stock. He investigated the assets and machinery, etc. He had ample opportunity to know of the contract. There was no allegation of the sale of the stock, but the complaint will be treated as amended to conform to the proof. 100 Ark. 217; 40 *Id.* 352; 29 *Id.* 323.

3. Appellant is the successor of the corporation and bound by its contract under the franchise. 107 Ark. 119; 112 *Id.* 260; 5 Thompson on Corporations (2 ed.), § 609.

#### STATEMENT OF FACTS.

The Major Stave Company instituted an action in the chancery court against L. M. Warmack to compel him to furnish it electric lights in accordance with the terms of a contract entered into between it and the Ashdown Light & Power Company to whose rights and liabilities Warmack succeeded. The material facts are as follows:

R. B. Bryant was granted a franchise by the town of Ashdown in Little River County, Arkansas, to furnish to its inhabitants electric lights. In the early part of 1912 Bryant assigned the franchise to the Ashdown Light & Power Company, a domestic corporation. On the 26th day of July, 1912, the Ashdown Light & Power Company entered into a contract with the Major Stave Company, a corporation in the town of Ashdown, situated near the

property of the Light & Power Company, whereby the stave company, in consideration of 40 per cent. of the gross earnings of the light and power company, agreed to furnish steam power for the operation of its light plant. The light and power company continued to operate under this contract until the 15th of August, 1914, at which time in consideration that the stave company would release it from the contract, the light and power company agreed to furnish to the stave company free electric current for a period of three years from that date for the purpose of lighting the plant of the stave company, provided the current should not exceed an average of one kilowatt per day. The light and power company installed at the plant of the stave company a one-kilowatt transformer for the purpose of measuring the current. H. G. Sanderson was a stockholder in the light and power company and purchased all of the stock of said corporation in the spring of 1915. He permitted certain of the officers of the corporation to retain one share of stock each in order to preserve the corporate existence. Sanderson continued to furnish light to the stave company in compliance with the contract above referred to. On the 20th day of December, 1915, H. G. Sanderson and L. M. Warmack entered into a written contract whereby the former agreed to exchange all the property of the light and power company, together with its franchise, with Warmack for certain property owned by him.

Sanderson testified that he advised Warmack of the contract the light and power company had with the stave company; that he thinks he advised him of all the contracts that the light and power company had with various parties; that he turned over to Warmack the insurance policies of the light and power company and certain contracts which had been made with the railroad companies and a contract with the water and sewer district; that he transferred the stock of the light and power company to Warmack and tendered it to him; that Warmack refused to receive it.

The testimony of Sanderson was corroborated by that of A. D. DuLaney. He testified that on March 15, 1916, he turned over to Warmack the abstract of real estate of the light and power company in Ashdown, a certified copy of the passage of the ordinance granting the franchise, certain insurance policies and a contract with the three railroad companies entering the town, and a contract with the water and sewer district. The contract with the stave company was carried out until Warmack took charge of the plant in 1916, when he refused to further furnish light to the stave company under the contract.

L. M. Warmack testified that he bought all the property of the light and power plant in Ashdown, which was formerly owned by the Ashdown Light & Power Company, from H. G. Sanderson; that he did not buy any stock in the Ashdown Light & Power Company and did not know there was any stock; that he did not know that this corporation was in existence at the time he exchanged property with Mr. Sanderson; that Sanderson did not advise him that the corporation was in existence and did not advise him of any contract between that corporation and the stave company; that he did not at the time agree to carry out any contract with the stave company; that he knew that Mr. Sanderson held a franchise from the town of Ashdown. On cross-examination he admitted that Sanderson told him of all the contracts that were bringing in money. He also admitted that he knew there was a contract with the three different railroads entering the town and one from the school district. He stated that at the time he bought the plant that he did not know that the Major Stave Company was receiving light from the plant.

On the part of the stave company it was shown that its plant was situated close to the plant of the light and power company and that the electric light wires ran directly from one company to the other and could be seen by any one who examined the light and power plant. Other facts will be stated or referred to in the opinion.

The chancellor found in favor of the Major Stave Company and issued a mandatory injunction directing Warmack to furnish it with light under the contract referred to in the statement of facts and also decreed the specific performance of that contract. Warmack has appealed.

HART, J., (after stating the facts). The contract in question was executed on the 15th day of August, 1914. Prior to that time there was a contract between the light and power company and the Major Stave Company whereby the latter was to furnish the power for running the plant of the former and was to receive therefor 40 per cent. of the gross earnings of the former. The light and power company desired to furnish its own motive power and for that reason entered into the contract in question. In consideration of being released from its former contract, and all claims or liability thereunder, it agreed that it would furnish the stave company the electric light used in its plant for the term of three years, provided the current should not exceed an average of one kilowatt. The light and power company performed this contract from the date of its execution on August 15, 1914, until the early part of January, 1916, when Warmack purchased the property of the light and power company and its franchises, which were assigned to him.

(1) The court should not have directed the specific performance of this contract. In the case of *Leonard v. Board of Directors of Plum Bayou Levee District*, 79 Ark. 42, the court held that equity will not decree specific performance of an executory contract to do ordinary work, as to build a levee, for the reason that there is no method by which its decree could be enforced. It does not follow, however, that the stave company was not entitled to injunctive relief. The light and power company was granted a franchise by the town of Ashdown to furnish electric lights to the town and the inhabitants thereof. In the enjoyment of this public franchise, it had the exclusive right to furnish electricity to the town and the inhabitants thereof. The stave company owned and op-



erated a stave plant in the town and the furnishing of electric current for lighting its plant was one of the ordinary and natural uses which was contemplated when the franchise was granted to the light and power company. The stave company had paid for the light. Under these circumstances an injunction will lie to prevent the cutting off of the supply of light, or if the current has been turned off by the public utility company, a mandatory injunction will be issued to compel it to turn the current on again. *McQuillan on Municipal Corporations*, Vol. 4, § § 1773 and 1774, and *Dillon on Municipal Corp.*, 5 ed., vol. 3, par. 1317.

(2) It is neither claimed nor shown that the contract in question is such a special contract that it prevents the corporation from supplying all its customers in the town of Ashdown. There is nothing in the record tending to show that there is anything in the ordinance granting the franchise to the light and power company that would prevent it from entering into the contract in question. The principle that the company must supply all impartially and without discrimination does not prevent it from entering into reasonable arrangements or agreements with its customers growing out of special circumstances. *Dillon on Municipal Corporations*, 5 ed., vol. 3, § 1317, p. 2207.

(3) Again it is contended that by the terms of the contract that Warmack was not required to carry out the contracts of the light and power plant. It is true the mere transfer of the assets of one corporation to another corporation or individual does not make the latter liable for the debts of the first corporation, but a corporation or individual may become liable for the debts of another corporation where it has expressly or impliedly assumed them. *Spear Mining Co. v. Shinn*, 93 Ark. 346, and *Good v. Ferguson & Wheeler, etc., Co.*, 107 Ark. 118.

The chancellor found that Warmack had at least impliedly assumed to carry out the contract with the light and power company. It is a settled rule of this court not to disturb the finding of fact made by a chancellor unless

it is against the preponderance of the evidence. As we have already seen, the light and power company was granted a franchise to supply the town of Ashdown and its inhabitants with electric lights. Warmack was operating the light plant under this franchise. He admits that he was carrying out all the contracts with consumers who were making monthly payments for lights furnished them. He also admits that he knew of the special contracts which had been made with the three railroads entering the town and with the school district. Sanderson testified that he told him of the existence of the contract in question. The plant of the stave company was situated near that of the light company and the wires ran direct from the plant of the light company to that of the stave company. It may be fairly assumed that Warmack saw these wires. He denies that he knew of the existence of the corporation called the Ashdown Light & Power Company, and says that he thought Sanderson was operating the plant in his own individual right. Sanderson testifies, however, that he told him the corporation was operating the light plant. Besides this, the insurance policies and special contracts which were turned over to Warmack and which he admitted receiving were notice to him that the corporation was operating the light plant. It is apparent from all the circumstances detailed in the statement of facts as well as others, small in themselves, which have been omitted from the statement of facts, that Warmack at least impliedly assumed to carry out all the contracts for furnishing lights of the light and power company with the inhabitants of the town. He knew he could only operate under the franchise granted to that company and all the circumstances introduced in evidence pointed to the fact that he assumed to carry out the lighting contracts of the company.

From the views we have expressed it follows that the court should not have directed the specific performance of the contract but was correct in granting a mandatory injunction to compel Warmack to again turn on the current at the plant of the stave company. In this way the

relative rights of the other residents of the town to be supplied with lights impartially and without discrimination will be preserved should the occasion arise therefor, caused by the inability of the light company to furnish sufficient lights for all consumers, or for other good reason.

Therefore, the decree in so far as it grants specific performance of the contract will be reversed, and in so far as it grants a mandatory injunction in favor of the stove company against Warmack to have the current again turned on at the plant of the stove company will be affirmed.

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TEAGUE v. HUTTO.

Opinion delivered January 28, 1918.

**REAL ESTATE BROKERS—SECRET COMMISSION.**—One S. undertook to act for appellant in the purchase of certain land, and secured H. to assist in closing the sale. Without the knowledge of appellant, a commission was paid H. for his services. *Held*, under the evidence that appellant was not entitled to recover from S. and H. for a secret commission collected by them, and that the evidence failed to show a secret understanding between H. and S. to induce appellant to make the purchase, in order that they might share in the commission.

Appeal from Lonoke Chancery Court; *John E. Martineau*, Chancellor; affirmed.

*Morris & Morris* and *C. A. Walls*, for appellant.

1. Appellees were both guilty of fraud. 71 Ark. 277.

2. Scroggin was the agent of Hutto and of appellant, a double agent, and his acts are binding upon both. 31 Cyc. 1458; 71 Ark. 277; 2 Pom. Eq. Jur. 884, 959; 31 Cyc. 1244; 1 Parsons Cont. (5 ed.) 73.

3. Hutto was appellants' agent and he is estopped from disclaiming his agency. 31 Cyc. 1244; 21 L. R. A. 55; 90 Ark. 301; 17 N. J. Eq. 554.

4. The \$750 which Scroggin received was not a gift but was simply carrying out a prior agreement and was paid by way of settlement or compromise. 90 Ark. 301.

5. Appellant was not guilty of any agreement to defraud a third person of a commission; he comes into equity with clean hands.

6. The value of the land does not enter into the merits of the case, appellees are liable for the secret commission. 71 Ark. 277.

*James B. Gray*, for appellees.

1. The findings of the chancellor will not be disturbed. 57 Ark. Law. Rep. 180; Jones on Ev. (2 ed.) 14-15; 47 Ark. 148; 8 Peters 244; 82 Ill. 589.

2. 71 Ark. 277 is not applicable here. There was neither fraud nor overreaching and no secret agreement. The commission was legitimately earned and all the dealings were fair and in good faith. 12 Cush. 27.

#### STATEMENT OF FACTS.

F. L. Teague instituted this action in the chancery court against Freed Hutto and D. H. Scroggin to compel them to account to him for a secret commission which he alleges they received from the other party while acting for him in the purchase of a certain tract of land in Lonoke County, Arkansas.

The allegations of the complaint were denied and the answer averred that no relation of trust or agency existed between Teague and Hutto and Scroggin.

F. L. Teague testified that he was a farmer and a customer and a close friend of D. H. Scroggin; that prior to this deal he had implicit confidence in Scroggin; that some time in January Mr. Scroggin got after him to buy the England place on Plum Bayou, as he wanted him for a neighbor, that he had land adjoining this place; Scroggin did not know the price for which this land could be bought, he thought it was either \$23,500 or \$28,500; but that he would see England for him when he returned; that he requested Mr. Scroggin to do this, as Mr. Scrog-

gin had already been figuring with him on the place; that when England came, he went to see Mr. Scroggin and told him that Mr. England had come, for him to get a price from England; that this was on the 20th day of January, 1917; that Scroggin was supposed to have gone to see Mr. England, for he came back and told him that England wanted \$28,500 for the place, \$10,000 down; but after talking with Mr. England awhile, Mr. England agreed to take for the place \$26,500 cash, and that the deal would have to be closed by 4:30 or 5 o'clock; that he requested Scroggin to call Mr. England over the phone and get an extension of time; but England refused to grant further time; that he finally agreed to take the place for \$26,500 and Mr. Scroggin called England and told him so; that, on the way up to Mr. England's Scroggin told him that Mr. England would rather make the deed to some third party and Scroggin suggested Hutto; Scroggin said that Hutto would fix up the papers and pass on the abstract and he would not charge anything for it; that Scroggin told him England had offered him, Scroggin, a commission out of the deal, but Scroggin said, "I do not want a cent out of it, you are too good a friend to me." Scroggin told him that Hutto wasn't to be paid anything out of the deal, maybe England would pay him one hundred dollars; that they entered into a contract, after reaching England's, wherein England agreed to convey the land to Freed Hutto for \$26,500.

That on Monday following the 31st, appellant learned from George Geolzier and Jim Lawhorn that they had had the same land bought for \$24,000 on the 20th day of January, the same day that he had bought it; that after learning this, appellant went to Scroggin and told him that he had been done wrong in this deal, but Scroggin assured him that he was mistaken, and told him that Geolzier and Lawhorn were trying to make him sick of his deal; that Scroggin further said Hutto knew nothing about the deal until Mr. England went to his house for him to sign the contract and again said that Hutto was

not getting a penny out of it; after being reassured by Mr. Scroggin, appellant was satisfied that the deal was straight; that prior to going to Mr. Scroggin to ascertain whether he had been treated wrong in this deal, he went to Mr. England and asked him, and that Mr. England told him that neither Hutto nor Scroggin got any commission or profit out of the deal; that some days later, appellant went to Hutto and asked him if he got a commission out of the sale of this land, and Hutto told me that he did get a commission but would not say how much; that, after learning from Mr. Hutto that he obtained a commission, he told Scroggin about it; that Scroggin said that he was glad that appellant had told him, for, if Hutto got anything out of it, he was entitled to part of it, as Hutto had nothing to do with the deal and knew nothing about the deal until England carried him the contract for him to sign; that he saw Scroggin on the 20th, and the deal was closed in the afternoon about 4 o'clock; that he was not familiar with transactions of this kind and depended solely on Mr. Scroggin to take care of him; that appellant never authorized Scroggin to retain Hutto to assist in closing up this deal; that Hutto had never talked with him either prior to or at the time of this deal about selling him this tract of land; that he did not know why the deed was made to Hutto and not direct to him; that England had never refused to convey the land to him; that Scroggin said Mr. England had rather convey it to Hutto; that he did not ask why it was necessary to make the deed to Mr. Hutto because he was depending on Mr. Scroggin and that Scroggin suggested that the deed be made to Hutto; that appellant did not know, until about ten days after the deeds and money had passed that Hutto or Scroggin had received a secret commission out of the deal; had never asked Hutto whether he was getting a commission until ten days after the money and deeds had passed but had believed Scroggin when he told him that Hutto was not getting a commission; never saw Hutto on the day of con-

tract for the place; never employed Hutto; did not know that Jim Lawhorn and George Geolzier had been trying to buy the place; nor that they had ever talked with Mr. England about purchasing the place, until told by them after his trade was closed.

The testimony of J. R. England is substantially as follows: During the year 1914, the land in controversy was listed with Freed Hutto for sale by J. R. England representing John C. England's estate. During the fall of 1916, F. L. Teague sold his plantation and contemplated purchasing another one. D. H. Scroggin was a merchant with whom Teague traded and the latter spoke to the former about buying another place. Freed Hutto was a real estate agent, and J. R. England had charge of the lands belonging to the estate of John C. England, deceased. All the parties lived at England, Arkansas, and were well acquainted with each other. The land in controversy was situated near England. Hutto told Scroggin that he intended to sell Teague a part of the Nelson & Hoyt lands that he had for sale. Scroggin replied that he did not think these lands would be suitable for Teague and that he wanted Teague to buy the England land, referring to the tract of land in controversy. This conversation occurred in the fall of 1916, but Hutto did not mention to Teague the purchase of the England place at that time. In the early part of January, 1917, England went to St. Louis, Missouri, on business and returned to England on the morning of the 20th inst. When England went home to lunch, he was informed by his wife that some one had called up and requested that he go by and see Hutto. England went to see Hutto immediately after lunch and found him sick in bed. Hutto had been sick for several days. Hutto asked England what was the least cash price he would take for the land. The former price he had listed the land for with Hutto was partly for cash and partly on a credit. England asked Hutto to whom he was going to sell the land. Hutto laughingly replied that it did not make any difference

and said: "If I get the money in the bank this afternoon, what will you take for the land?" England responded that he would take \$25,000 cash net to him, if the deal was closed by 4 or 5 o'clock on the same afternoon. Hutto accepted his proposition. Hutto then asked England to call up Scroggin to whom he supposed Hutto was selling the land. Scroggin came over and upon being told the price of the land tried to induce England to reduce the price; but the latter refused. England and Scroggin then left Hutto's house and went down town. Later Scroggin called up England and asked him to wait until the next Monday so that further time might be had for examining the land. This was Saturday. England refused the extension of time and later in the afternoon Scroggin and Teague came to the office of England to close the transaction. England objected to making a deed to Teague on the ground that Jas. Lawhorn, an intimate friend had already mentioned Teague to him as a prospective purchaser and he was afraid that Lawhorn would think he had not been treated right and would want a commission if the deed was made to Teague. England then went to the home of Hutto and entered into a contract with him for the sale of the land for \$26,500. The deed was executed the same day and immediately Hutto executed a deed to Teague and the money was paid to England. A part of the money was borrowed by Teague from the bank of which Hutto was president. As soon as England returned from St. Louis, he agreed to sell Lawhorn the place for \$24,000 net and would have closed the deal with him if Lawhorn had paid the money at any time before noon on the day of the 20th although he was not legally bound to do so. Teague got a cheap place and England sold because of war conditions, realizing that if he sold he would get the John C. England estate in much safer condition.

According to the testimony of Hutto, he talked with Scroggin about the first of January, 1917, in regard to selling some other lands to Teague. Scroggin replied



that he did not think it best for Teague to buy these lands but that he was in the market for a farm and that he thought he would buy the England place. Hutto was sick in bed for several days and had his wife call up England several days before the 20th of January, 1917. On that day his wife again called up England's residence and was told that England would come over immediately after lunch. Hutto had two parties in view as prospective purchasers of the land, viz: Teague and R. N. Oates of Russellville, Arkansas. After England refused to give him a longer time than that day, he abandoned the idea of negotiating with Oates because the latter could not reach England that day and examine the land. Hutto wanted England to make a deed direct to Teague and thought that the difference between \$25,000, the price he agreed to pay England, and \$26,500, the price Teague paid, would be his commissions. The deed was made to him and by him to Teague at the suggestion of England, who thought he might have to pay another commission to Lawhorn if he made the deed direct to Teague. About thirty days after the sale Oates came to England and examined the land. He then offered Teague \$30,000 cash for the place and Teague refused the offer. The price paid by Teague was very reasonable and the land was really worth more than Teague paid for it. Hutto denied that he was agent for Teague or that he entered into any conspiracy with Scroggin to make a secret profit out of Teague. He did not tell Teague the commission he was to make in the sale because that was not usually done. Such act tended to hinder a sale because the purchaser would want to have the commission reduced before he would complete the sale. There was no understanding between Hutto and Scroggin whereby the latter was to receive any of the commission. Hutto does not think that Scroggin would ever have known that he received any commission out of the transaction if he had not told Teague that he did receive a commission, and Teague then told Scroggin. In a day or two after the sale, Teague

came to Hutto and expressed dissatisfaction about it, said that he had not been treated right and especially by Scroggin. Hutto told Teague that he had not treated him wrong but had just sold the place like any other real estate and had made a commission out of it. Scroggin soon after this conversation between Hutto and Teague came to Hutto and told him that if he had been paid a commission he ought to have half of it. Hutto told him he had made a commission of \$1,500. Scroggin insisted that Hutto should pay him half of the commission and Hutto finally did so.

The testimony of D. H. Scroggin was, briefly stated, as follows: Mr. Teague was one of my customers and I have known him about twelve years. About the first of January, 1917, Teague was about my store a good deal as he had nothing to do. He said that he wished he knew where he could buy a good piece of land and asked me if I knew of any for sale. I told him that I did not know of any that he could buy for a reasonable price. After that we talked about several tracts of land. In a few days I happened to think that England had offered to sell me the England place and I told Teague about it. In a few days after that it snowed and I went hunting. In doing so I passed over the England farm. Teague was in the store when I returned that evening and I told him about it. He replied that if he had known about it, he would have gone with me. I told him that I could not see the land because it was covered with snow, but that from the cotton stalks it must be very fine land. I did not think anything more about it until a few days thereafter when Hutto told me he was going to try to sell the Nelson & Hoyt lands to Teague. I told Hutto that I did not think it advisable to sell Teague those lands; for at his age by the time he got the land cleared he would be too old to look after it; that I was only acting as a friend to Teague but that when he got the lands cleared he would kill himself working it. At that time I mentioned to Hutto that I was going to try to get Teague to buy the

England place. Later I talked to Teague about the place but had forgotten having spoken to Hutto about it. Teague asked me to see England about it and I told him England was in St. Louis. I told him he had better see England himself. But I told him to watch out for Mr. England when he came home and I would see him. I was disinterested and did not want to make anything out of it. On the 20th of January, 1917, I met Teague on the street and he told me that England was home and that if I was going to do anything about the matter, I had better see England. I called up England's residence and several other places trying to find him, but failed to do so. About that time I was asked over the phone to come to Hutto's. He was sick and I had been to his house several different days to see him while he was sick. I thought that he might be worse and went to his house and found England there. I asked Hutto how he was and did not know that I had been called there about the trade. After we had talked a little while about Hutto's condition, I told him that I wanted to see him about the purchase of the England place by Mr. Teague. Hutto said: "You can make a price on that place of \$26,500." I replied that I did not know whether Teague would buy it or not, but said that I would go back and tell him. I told Teague that England wanted \$26,500 for the place. He replied: "Well, Scroggin, I do not know what about it, this buying a great big thing and not looking at it." I agreed with him and he asked me what I thought about it. I said: "I am not going to advise you Mr. Teague. Now don't buy this place on my say so, Mr. Teague, for it is too big a thing and I could not say. I finally looked at my watch and told him that I had told Mr. England I would call him up about it. He said, 'Well call him up and tell him I will take it.' We went to Mr. England's office and I said: 'Well now I put you gentlemen together, close this trade.' " Mr. Teague said he would take the place at \$26,500 and Mr. England said to him: "I can't sell you this place but will sell it to Hutto and in

turn he can sell it to you." One of us asked why and he said he wanted to avoid two commissions. That was the first I had thought of a commission. They wrote up a contract of sale and Teague signed it. England then took the contract to Hutto's for him to sign and agreed to then meet us at the bank. England made a deed to Hutto and then Hutto made a deed to Teague to the land. In a few days Teague came into my store and asked me if I knew that Hutto had gotten a commission out of the trade. I told him that I did not but that if he did I was going to see him about it and demand half of it. I told Teague I would let him know about it. I saw Hutto and claimed half of the commission. He at first laughed and jollied me but finally told me he had received \$1,500 and agreed to pay me half of it, which he did. In the meantime, I had learned that Teague was mad at me about the matter. I acted as a friend to Teague in the matter and tried to save him money. I did not know that Hutto was going to get a commission out of the transaction and did not expect any myself. I did not know that Hutto was interested in the matter until I called at his house on the day the trade was made and found England was there. When I found out from Teague after the sale, that Hutto was getting a commission, it was then I thought for the first time about a commission and claiming half of it. Prior to that time there had been no understanding between Hutto and myself about a commission. Other testimony will be stated or referred to in the opinion.

The chancellor found in favor of the defendants and a decree accordingly was entered of record. The plaintiff has appealed.

HART, J., (after stating the facts). It is claimed by counsel for the plaintiff that a breach of duty and obligation created by the relation of confidence between principal and agent is involved in this lawsuit and that Hutto and Scroggin acquired secret profits, during the existence of that relationship and that they should be held as trustees and compelled to account therefor to Teague,

their principal. It is the theory of the plaintiff that Scroggin was the agent of Teague for the purchase of the lands in question and that Hutto became aware of this fact, and entered into a conspiracy with him to secure a secret profit for themselves in the transaction based upon the trust and confidence which Teague placed in Scroggin. They rely upon the case of *Tegarden v. Big Star Zinc Co.*, 71 Ark. 277, and contend that the facts of the present case bring it within the principles of law laid down in that case.

Counsel for the defendants while admitting the correctness of the principles of law decided in that case and its application to the facts there presented by the record, insist that the holding of the chancellor was correct under the facts disclosed by the record in the present case. In this claim we think counsel are correct. It will be appropriate here to examine the case relied upon for a reversal of the decree by counsel for the plaintiff and compare the facts of that case with those shown by the record in the present case. There, Bordeen authorized the Tegarden Bros. to sell certain mineral lands for him. They in turn agreed with McFarland that if he would assist them in selling the lands they would divide the commissions to be received by them for selling the lands. McFarland organized the Big Star Zinc Company for the purpose of buying the lands. He became a member of it. The completion of the organization was delayed and during its progress, the lands were conveyed to McFarland for a much less sum than it was intended that the Zinc Company should pay for them. McFarland represented to each member of the corporation during the progress of its formation that the lands could not be purchased for less than \$5,000, a sum greatly in excess of what Bordeen asked and received for them. The corporation purchased the lands at this price. The Tegardens knew the representations made to the members by McFarland and sanctioned his course and conduct in the matter. The court held that under these cir-

cumstances McFarland could not make a secret profit out of the sale of the land, and the Tegardens being parties to what he did, occupied the same position he did because he had acted in the matter with their knowledge and approval.

In the present case the record does not show that Hutto had any knowledge that Scroggin was acting as the agent of Teague. He only supposed that Scroggin was the friend of Teague and for that reason Teague consulted him. He intended that the deed should be made direct to Teague. England suggested otherwise for reasons of his own which are entirely disconnected with the theory that he was endeavoring to assist Hutto and Scroggin in making a secret commission out of the sale. The fact that Hutto did not state the amount of the commission to be received by him is not to be taken against him; for obviously such a course would tend to hinder the sale. It is claimed that the fact that the check by Hutto to Scroggin was dated on the day of the sale, that this contradicts their testimony to the effect that it was done a few days after the sale, and was not thought of until it was done. It is true the check was dated the day of the sale but it was not presented for payment until the second day of February. This tends to corroborate the testimony of Hutto and Scroggin rather than contradict it. The check was doubtless presented for payment at the bank as soon as it was given, but was dated back as of the date of the original transaction. The check for the purchase money was collected at once and it is likely this check would have been presented at once too and the whole matter closed up. We have not attempted to enter into a detailed discussion of the evidence, but both Hutto and Scroggin testify in positive terms that there was no agreement of any kind between themselves for a commission in the sale. Their testimony is corroborated by England. He had no interest in the matter. It was generally known that he wished to sell the place. The negotiations between him and

Hutto were free from suspicious circumstances. Under all the facts and circumstances, the chancellor was correct in holding that the testimony was insufficient to show that Hutto knew that Scroggin was the agent of Teague for the purchase of the lands and conspired with him to induce Teague to purchase the lands in order that they might make a secret profit out of the transaction.

This brings us to a consideration of whether or not Scroggin was the agent of Teague for the purchase of the lands. The testimony on this point is in direct conflict. According to the testimony of Teague, Scroggin was his agent. Scroggin denied the agency and testified that he only acted as the friend of Teague in the matter because he thought it to be a good investment. He said he was entirely disinterested and only advised with Teague about it as a friend. The investment turned out to be a good one. Scroggin says he was only interested as a friend of Teague in seeing that he did not make a bad bargain. That he had no thought of a commission in the matter until several days after the trade was made, and then concluded that if Hutto had received a commission, he should have half of it. His demand for this was not, according to his testimony, the result of any agreement or understanding, direct or implied, before the sale. His testimony is in some respects corroborated by that of Hutto and England. The burden of proof was upon Teague to establish the allegations of his complaint by a preponderance of the evidence. The chancellor found that he had not done so.

It is the settled rule of this court that the finding of facts made by a chancellor will not be disturbed on appeal unless they are against the preponderance of the evidence. Therefore, the decree will be affirmed.

## BRITT v. HARPER.

Opinion delivered January 28, 1918.

1. **TAX SALES—VALIDITY—CONVENING OF COURT ON IMPROPER DAY.**—A sale of land for the nonpayment of taxes is void where the levying court, which levied the taxes, convened on a day other than that required by law.
2. **TAX SALES—VALIDITY—RIGHT OF MORTGAGEE IN POSSESSION.**—A mortgagee in possession has the right to take the necessary and proper action to protect that possession, and may maintain an action to cancel an invalid sale of the land for taxes.

Cross-appeals from Union Chancery Court; *James M. Barker*, Chancellor; reversed on cross-appeal, affirmed on appeal.

*George M. LeCroy*, for appellant.

1. Appellees were not entitled to a perpetual injunction; they had no title to the land and had not been in possession long enough to claim by adverse possession. 22 Cyc. 750; 15 Cal. 496.

2. Appellant having a lien for taxes was entitled to possession. Kirby's Digest, § 2759; 84 Ark. 587; 1 Story, Eq. 483; Whittaker on Liens, 68; 30 Ark. 122.

3. Appellees attempting to base their title and right of recovery upon adverse possession was not entitled to affirmative relief of any kind. 129 Ark. 390.

4. Appellees are estopped from disputing appellant's title. 1 Cyc. 1095.

5. The tax sale was not void. 80 N. W. 484; 59 Neb. 170. See also Kirby's Digest, § 7105. Const., art. 7, § 8, 12, 31.

*W. E. Patterson*, for appellees.

1. The injunction was properly issued. Appellees had no other adequate remedy. Appellant did not own the land and was not entitled to possession.

2. The tax sale was void. 68 Ark. 340; 69 *Id.* 576; Kirby's Digest, § 5057, 7105; 73 Ark. 557; 84 *Id.* 8; 76 *Id.* 25. The title should be quieted in Mrs. Harper.



SMITH, J. One John Daniels purchased three forty-acre tracts of land in 1902 from one J. J. Cottrell, and about this time Daniels executed a deed of trust on the land to a Doctor Harper, for \$320, to secure the payment of a note for that amount, and it is said that this loan represented the purchase money of the land. Daniels went into possession of the land, and improved a portion of it, but failed to discharge the deed of trust. Prior to his death, Doctor Harper assigned the note and deed of trust to his wife, and, in 1908, the debt remaining unpaid, Mrs. Harper took from Daniels a deed to the land, which she supposed conveyed the entire tract but which failed, in fact, to include the forty in controversy here. Mrs. Harper was represented in the transaction by one W. E. Mason, who explained that the deed did not include this forty, because it had been sold for the nonpayment of taxes and that he desired that matter closed before taking the deed. He also testified that he canceled the deed of trust of record in so far as it related to the two forties conveyed in the deed, but that he left the deed of trust unsatisfied as to the remaining forty, because the deed of trust was not to be fully satisfied until the title to that tract of land had been cleared, and the testimony is to the effect that Mrs. Harper took possession of this forty along with the other two, and that, while she assumed that she was taking possession under a deed conveying the three forties, her attitude as to the disputed forty was that of a mortgagee in possession. Daniels left the land in possession of one Jordan Wysinger, who cultivated the land during the year 1909 but paid no rent thereon to any one. There is conflicting testimony in regard to the possession of the land from and after 1908 to the year 1911, since which time, according to the finding of the court below and the preponderance of the evidence, Mrs. Harper has had continuous possession.

Appellant Britt, by quitclaim deed, acquired the title of a tax purchaser, and immediately undertook the assertion of that title by bringing suits for rent and other

purposes, and by putting his tenants in possession of a portion of the land.

Mrs. Harper and her tenant thereupon brought this suit to enjoin Britt from bringing a multiplicity of suits against her and her tenant, and she prayed also for the cancellation of the outstanding tax title. An answer and cross-complaint was filed by Britt, in which Mrs. Harper's title and possession were denied, and Britt alleged his own title under the tax deed to his grantor, and there was a prayer for possession, for an accounting as to rents, and for a decree quieting and confirming Britt's own title. A reply to the answer and cross-complaint was filed, in which it was alleged that the tax sale under which Britt's grantor purchased was void, for the reason that the levying court which undertook to levy the taxes for the year 1902 (the taxes for the nonpayment of which the land was sold) convened on the third Monday in October, 1902, and not on the day required by law for said court to be held.

The chancellor made findings of fact upon all the disputed issues in the case, and we are unable to say that any of these findings are clearly against the preponderance of the evidence. The court found that Mrs. Harper had had continuous possession of the land for the period only of six years, and, as she was unable to produce any evidence of a paper title, the court denied her prayer that her title be quieted. The court further found that the quorum or levying court of Union County convened for the first time in the year 1902 on the third Monday of October, at which date the taxes were levied, and that the sale of the land for the nonpayment of these taxes was void. The court further found that Mrs. Harper, through her tenant, had entered into the possession of the disputed land under the assumption that her deed therefor described the land, and it also appears that, in any event, her attitude was that of a mortgagee in possession under an agreement for a deed, and that, as such, she had the right to maintain an action to enjoin Britt from interfering with her possession and to cancel the outstanding tax title as well.

The court made perpetual the temporary restraining order which had been issued during the pendency of the litigation, thereby perpetually enjoining Britt from interfering with Mrs. Harper's possession, and Britt has appealed from this decree. For the reasons stated in the decree, that Mrs. Harper had not had the possession of the land for a period of seven years, and because she had no paper title thereto, the court refused to grant her the affirmative relief of canceling the outstanding tax title, although the court held that the sale upon which that title was based was void for the reasons previously stated, and refused, on that account, to award Britt the possession of the land. Mrs. Harper prayed a cross-appeal from this decree.

Appellant concedes that the court properly held the tax sale void under the authority of the cases of *Berger v. Lutterloh*, 69 Ark. 576, and of *Hilliard v. Bunker*, 68 Ark. 340, where it was held that a sale of land for nonpayment of taxes is void where the levying court, which levied the county taxes, convened on the third, instead of the first, Monday in October. Appellant presents a strong argument against the correctness of these decisions. But, inasmuch as they have become rules of property, we decline to review them, and affirm the action of the court below in holding the tax sale void.

Upon the authority of the case of *Richards v. Howell*, 129 Ark. 390, 196 S. W. 483, the action of the court, in denying Mrs. Harper the affirmative relief of quieting her title, would have been proper had her right to this relief been predicated alone upon her adverse possession. But this relief should have been granted her upon another theory, and that is, that she was a mortgagee in possession, and, as such, had the right to take the necessary and proper action to protect that possession, and the court should, therefore, have canceled the tax title.

The decree of the court below will, therefore, be affirmed on the appeal, and reversed upon the cross-appeal, and the cause will be remanded with directions to the court below to cancel the outstanding tax title.

## HART v. HAMMETT GROCER COMPANY.

Opinion delivered January 28, 1918.

1. **CONTRACTS—MAY BE MADE BY CORRESPONDENCE.**—Contracts may be made by telegram and letters, and when so evidenced, it is the duty of the trial court to interpret the contract and declare its terms.
2. **CONTRACTS—OFFER AND ACCEPTANCE.**—After negotiations for the purchase and sale of a car of beans, the following telegrams *held* to constitute an offer and acceptance, and to make a binding contract: "Ship Hammett car CHP two twenty-five delivered immediate confirm." "All right confirm car choice two twenty-five immediate shipment."
3. **CONTRACTS—FORMATION.**—The above telegrams concerned a shipment of a car of beans, and after sending the telegram of acceptance, the seller wrote a letter of confirmation. *Held*, it was not prejudicial to submit to the jury the issue of whether a contract was made and the terms thereof.

Appeal from Jefferson Circuit Court; *W. B. Sorrells*, Judge; affirmed.

*Rowell & Alexander*, for appellant.

1. No binding contract was ever entered into. The two telegrams were not sufficient and the letter of confirmation did not contain the same terms set out in the offer. The court erred in its instructions and in submitting the case to the jury. The court should have construed the contract. 77 Ark. 261; 89 *Id.* 239; 97 *Id.* 613; 95 *Id.* 421; 121 *Id.* 150; 112 *Id.* 380.

2. Defendant complied with his contract and shipped the car and plaintiff was not entitled to recover. 97 Ark. 613; 9 Cyc. 260.

3. The law with reference to contracts governed by usage and custom is well settled. 106 Ark. 400; 113 *Id.* 556.

*Taylor, Jones & Taylor*, for appellee.

1. The two telegrams and letter constituted a contract. There is no error in the instructions. 111 Ark. 263; Clark & Skyles on Agency, § § 748, 765, 781. "Delivered" means delivered at destination Pine Bluff, Ark.

HUMPHREYS, J. Appellee, a corporation doing a grocery business at Pine Bluff, Ark., instituted suit against Hart Bros., a partnership engaged in the bean business at Saginaw, Mich., appellant being a member thereof, in the Jefferson Circuit Court to recover damages for failure of Hart Bros. to deliver a car of navy beans to appellee in Pine Bluff, under an alleged contract for delivery to appellee in said city at \$2.25 per bushel. It was alleged that the price advanced from \$2.25 to \$3.19 per bushel between the date of purchase and date for delivery.

Appellant denied that the contract of sale provided for delivery in Pine Bluff, but, on the contrary, alleged that it provided for delivery on board cars at the point of shipment; and alleged that the beans were shipped in accordance with the acceptance of the order and rules and regulations of the Michigan Bean Jobbers' Association which governed the shipment; that said rules and regulations were known to all the parties, and, by usage and custom among bankers and wholesale grocers, were understood to mean that the buyer assumed the risk of transportation.

The oral evidence adduced on the part of appellee tended to show that the beans were to be shipped immediately and delivered to the appellee at Pine Bluff; that A. W. Nunn, manager of the Hammett Grocer Company, knew of the existence of the association and that it had rules but was not familiar with the rules or their purposes.

The oral evidence adduced on the part of appellant tended to show that the beans were sold to appellee under the rules and regulations provided by the constitution and by-laws of the Michigan Bean Jobbers' Association, which contained the form of an "Official Sales Contract" required to be used by the members of the association in all purchases and sales of beans in which the following clause appeared:

“Prices named herein include ‘Cost and Freight’ only. This order is not sold ‘Delivered.’ Notwithstanding shipped to seller’s order, buyer assumes responsibility for delay in transit, upon issuance of Bill of Lading or Carrier’s receipt to shipper. Seller is not liable for non-shipment caused by fire, strikes, or unavoidable causes beyond seller’s control;” also, that the “Official Sales Contract” was generally used throughout the United States wherever Michigan beans were sold; that when beans were sold and bought under said rules, a delivered price included only the cost and freight to destination, and responsibility of delivery was assumed by the buyer; that the word “delivered” in said rules meant the cost, plus the freight, and was not a guaranty of the delivery of the beans.

The record disclosed by the undisputed evidence that the car of beans was shipped to Pine Bluff by Hart Bros. to its own order with bill of lading and draft attached; that the beans were destroyed en route by fire in a wreck at Niles, Michigan; that the draft was presented and payment refused on account of the failure to deliver the car of beans at Pine Bluff; that Hart Bros. refused to supply another car, claiming that they were exempt from further liability after placing the beans on board the car; that appellant insisted that appellee present a claim to the railroad company covering the loss; that appellee refused and insisted that under the terms of the contract, the loss was appellant’s; that after the refusal of appellee to present a claim, appellant presented a claim to the railroad company for the loss and collected the contract price.

It is also undisputed that the Arkansas Brokerage Company sold the car of beans to appellee subject to confirmation by Hart Bros., and that at the instance of appellee, the Arkansas Brokerage Company sent the following telegram to Hart Bros.:

"Pine Bluff, Ark., July 25, 1914.

"Hart Brothers, Saginaw, Mich.

"Ship Hammett car CHP Two Twenty-five delivered immediate confirm.

"Arkansas Brokerage Co."

Hart Bros. responded by telegram as follows:

"Saginaw, July 27, 1914.

"Arkansas Brokerage Company,

"Pine Bluff, Arkansas.

"All right confirm car choice two twenty-five immediate shipment. "Hart Brothers."

The telegram was followed by a confirmation letter sent to Arkansas Brokerage Company, which is as follows:

"Confirmation of Sale No. 265. Hart Brothers. Wholesale Shippers, Beans, Hay and Grain. Saginaw W. S. Michigan, July twenty-seventh, nineteen fourteen. Hammett Grocery Company, Pine Bluff, Arkansas. We confirm sale made to you this date by Arkansas Brokerage Company. Two hundred and fifty bags of C. H. P. Pea Beans, Two twenty-five per bushel delivered. We certify this to be true copy of the original confirmation of sale. Time of shipment, immediate. Route M. C. Wabash. Terms: Michigan Bean Jobbers' Association Rules and Grading on Beans to govern. Weights guaranteed within one-fourth of one per cent. Hay. National Hay Association Rules and Grades to govern. Weights guaranteed within one per cent. Grain. Official Destination Weights and Grades to govern. Yours truly,  
Hart Brothers."

The undisputed evidence also showed that the letters "CHP," used in the first telegram, meant "choice hand picked" navy beans.

The case was sent to the jury to determine under the evidence whether the parties made a contract and whether one of its terms was that the beans should be delivered at Pine Bluff or delivered on board cars at the shipping point.

The jury returned a verdict in favor of appellee for \$745.07 and judgment was rendered thereon, from which an appeal has been prosecuted to this court.

It is insisted by appellant, under the facts in this case, that the court erred in refusing to peremptorily instruct a verdict for appellant—

First, because it is said that the two telegrams and confirmation notice did not constitute a contract;

Second, that if they did constitute a contract, it was governed by the rules and regulations of the Michigan Bean Jobbers' Association.

(1) This court is committed to the rule that contracts may be made by telegrams and letters and that when so evidenced, it is the duty of the trial court to interpret the contract and declare its terms. *McDonough v. Williams*, 77 Ark. 261; *Mann v. Urquhart*, 89 Ark. 239; *Cage v. Black*, 97 Ark. 613; *Porter v. Gossell*, 112 Ark. 380.

(2) Applying this rule to the instant case, the court is of opinion that the two telegrams constituted a valid contract between the parties. The first telegram was an offer on the part of Hammett Grocer Company, through the agency of the Arkansas Brokerage Company, to buy a car of choice hand picked beans from Hart Bros., at \$2.25 per bushel, to be delivered to it at Pine Bluff, Arkansas. The second telegram was an unconditional acceptance of the offer by Hart Bros. It is insisted that because the word "delivered" appeared in the first telegram and was omitted from the response message that the offer was declined. The words "all right" and the word "confirm" in the response message indicate acceptance and not rejection. It is said by appellant that the word "delivered" in the first message had reference to the price at Pine Bluff under the interpretation placed upon it by the "official Sales Contract" contained in the rules and regulation of the Michigan Bean Jobbers' Association. If this were the correct interpretation of the word used in the telegrams, then to be consistent, appel-



lant should contend that the price fixed in the response message was a price for the beans at the shipping point. No such claim is made by appellant. As we understand it, appellant does not now claim that the beans were sold at \$2.25 per bushel, exclusive of freight charges. This convinces us that the word "delivered," used in the first message, applied to the delivery of the beans and had no application whatever to the price fixed in the message. When both telegrams are read together, the word "delivered" is clearly implied in the response message.

It is insisted, however, that the interpretation placed upon the word "delivered" under the heading "terms" in the letter of confirmation and in the form of the "Official Sales Contract" must, by usage and custom, control the meaning of the word "delivered" in the first telegram. There would be force in this argument if the form of the "Official Sales Contract" had been adopted in the telegrams. The reference to the rules and regulations of the Michigan Bean Jobbers' Association in the letter of confirmation could in no way affect a contract which had been completed by telegram prior to the delivery of the letter. The proof with reference to the usage and custom only goes to the extent of showing that when beans were sold and purchased under the "Official Sales Contract," the special meaning given to the word "delivery" therein should control. The sale in the instant case was made in a different form from the "Official Sales Contract" and was not therefore controlled by it.

(3) Under this view of the law, the trial court committed no prejudicial error in sending the case to the jury to determine whether a contract had been made between the parties and the terms thereof, nor in refusing to give instruction No. 2, requested by appellant, bearing upon the interpretation of the contract by custom and usage.

No reversible error appearing of record, the judgment is affirmed.

## BAILEY v. FORD.

Opinion delivered January 28, 1918.

1. INNOCENT PURCHASER—NOTICE.—Appellant purchased property to which a deed had previously been given, but *held* under the facts in proof that appellant was an innocent purchaser.
2. LIS PENDENS—RULES GOVERNING.—The purpose of the rule of *lis pendens* is to prevent the alienation of property which is the subject of litigation during the pendency of the suit, and by so doing to give full effect to any decree or judgment which might be rendered in the case in favor of the party filing the *lis pendens*. A *lis pendens* is not actual notice to any one who does not know the contents, by inspection or otherwise. A purchaser of the property during the pendency of the suit, under a *lis pendens*, is constructively bound by the decree or judgment rendered in the case in favor of the party filing the same, and no further; the purchaser is not constructively bound by the claims of a party to a suit who filed no *lis pendens* setting forth the claim; nor is a purchaser bound constructively under a *lis pendens* beyond the life of the suit.

Appeal from Prairie Chancery Court, Northern District; *John M. Elliott*, Chancellor; reversed.

*Geo. M. Chapline*, for appellant.

1. Bailey was an innocent purchaser and had no notice of Ford's claim, actual or constructive. Nor is he affected by the *lis pendens*. 25 Cyc. 1469-70; 2 L. R. A. 50; 25 Cyc. 1470; Am. Cas. 1915 C. 15; Kirby's Digest, § 5149; 21 A. & E. Enc. Law 646; 40 Am. St. 354; 7 A. & E. Ann. Cases 1090; 105 Ky. 63; 12 Pac. 537; 131 Ill. 376; 73 *Id.* 477; 2 Devlin on Deeds, § 799.

*Chas. A. Walls* and *W. A. Leach*, for appellee.

Bailey was not an innocent purchaser. 39 Cyc. 1687-8; 95 Ark. 582; 200 U. S. 321. The burden was on him to prove good faith. 103 Ark. 425; 80 *Id.* 86; 75 *Id.* 228. He had actual notice. 39 Cyc. 1783.

2. He had constructive notice by *lis pendens*. 25 Cyc. 1480; 118 Ark. 144; 57 *Id.* 229; 57 *Id.* 97; 36 *Id.* 217; 31 *Id.* 491; 12 *Id.* 564; 123 *Id.* 536; 122 *Id.* 445; 50 *Id.* 323; 2 Devlin Deeds, § 792; 70 Ark. 260. See also, 14 Cyc. 391; Kirby's Digest, § 5083; 107 Ark. 353; 105 *Id.*

86; 5 Allen (Mass.) 377, as to dismissal of suit and bringing another within the year.

HUMPHREYS, J. Appellee instituted suit in the Prairie chancery court against R. L. Wilson and J. A. Diffie on the 5th day of February, 1912, to restore a lost deed to the following described real estate in Prairie County, Arkansas, towit: Northeast quarter of the northeast quarter; west one-half of the northeast quarter and the northwest quarter of the southeast quarter, all in section 18, township 4 north, range 7 west, containing 160 acres, and to partition same between Diffie and himself in the proportion of one-half to each, in which it was alleged that he and Diffie procured title to said real estate on October 16, 1909, under a deed from Wilson and wife. When the suit was commenced a *lis pendens* was filed. In the spring of 1914, appellee filed an amended bill in substance the same as the original, with the additional allegation that R. L. Wilson had conveyed said real estate to C. C. Bailey on November 3, 1911. Bailey was made a party to this amended bill and his deed sought to be canceled upon the allegation that he bought the land with notice of appellee's interest therein. Bailey filed an answer, claiming title in himself under deed of November 3, 1911, from R. L. Wilson and wife, and denying that he bought with notice of appellee's interest. This suit was dismissed against C. C. Bailey for the want of prosecution with leave to appellee's attorney to reinstate same at the next term of court. An amended bill was again filed on October 16, 1915, in substance the same as the former bills, to which an answer was filed by C. C. Bailey, asserting that he purchased said real estate November 3, 1911, without actual or constructive notice that appellee had any claim or right thereto, and had immediately entered into possession of the premises and continued in the possession and paid the taxes since that time. M. J. Bailey was made a party on the suggestion that C. C. Bailey had conveyed the property to her.

This cause was submitted to the chancellor on the issue of whether C. C. Bailey was an innocent purchaser under the pleadings and evidence, from which the chancellor found that C. C. and Maggie J. Bailey were in possession of facts sufficient to put them upon inquiry as to the appellee's title, and that they were not innocent purchasers. Based upon that finding and the further findings that appellee owned an undivided one-half interest and the Baileys the other one-half interest in said land, same not being susceptible of division in kind, and that the deed from R. L. Wilson and wife to Ford had been lost and destroyed, rendered a decree establishing the lost instrument and partitioning and ordering the sale of said real estate.

An appeal has been prosecuted from the findings and decree of the chancery court and same is before us for trial *de novo*.

The record revealed with certainty that R. L. Wilson and wife conveyed the lands in question to J. D. Diffie and J. P. Ford on October 16, 1909, for a right to sell washing powder in Alabama; that Diffie and Ford were partners in the patent territorial right conveyed to Wilson in exchange for his lands; that on June 27, 1911, Wilson brought suit against J. D. Diffie and J. P. Ford to cancel the deed of conveyance aforesaid for fraud; that a *lis pendens* was filed when the suit was commenced; that service was had upon both Diffie and Ford, and that neither answered the complaint; that the case was settled by a reconveyance of the lands to R. L. Wilson by J. D. Diffie on July 8, 1911, and the reconveyance of the patent territorial right of Wilson to Diffie at the same time; that the suit was abandoned and dismissed; that on November 3, 1911, R. L. Wilson sold and conveyed the same lands to C. C. Bailey for \$2,000 in merchandise; that the land had a house on it with a garden fenced in, which appellee had cleaned out, and that the grass lands adjoining were not fenced but that beginning with the

year 1912 or 1913, he cut the grass on the unenclosed lands and manufactured same into hay for sale; that on and after the date of his purchase he paid the taxes on said real estate; that appellee instituted the original suit in this case and filed a *lis pendens* on April 5, 1912; that C. C. Bailey filed his deed to said lands for record on April 9, 1912, and after filing his deed, was made a party to this suit.

Appellee testified that about a month after he and Diffie acquired the land he tried to get C. C. Bailey, who was a real estate agent, to sell the land for him; that he never described the land to Bailey nor told him from whom they purchased it, nor designated it in any particular way, but that he told him where it lay; that Bailey refused to take it for sale, saying that he was not doing business east of Ward.

C. C. Bailey testified that he had no such conversation with appellee; that the first information he had that Diffie and Ford had obtained a deed from R. L. Wilson, on October 16, 1909, was after service had been obtained on him in this suit; that then Wilson told him the matter had been settled and gave him the deed in which Diffie had reconveyed the lands to Wilson.

J. A. Leach, abstractor, testified that C. C. Bailey employed him to make an abstract of the 160 acres in question and at the time he informed him of the pendency of the partition suit and the filing of a *lis pendens* therein; that Bailey responded that he knew of the *lis pendens* and cared nothing about it as the matter had been settled; that Bailey instructed him not to show the *lis pendens* in the abstract and for that reason it was left out.

The date of this conversation is not definitely fixed, but it is quite apparent from the record that it was in reference to the *lis pendens* filed in aid of appellee's suit to restore his lost deed, and not to the *lis pendens* filed

by Wilson in aid of the suit to cancel his deed to Diffie and Ford as fraudulent.

Bailey also denied having such a conversation with Leach.

It is insisted by appellant that the evidence is not sufficient upon which to base a finding that Bailey had actual notice of the conveyance from R. L. Wilson and wife to J. D. Diffie and J. P. Ford, at the time he purchased the land on November 3, 1911. The testimony of appellee concerning the conversation he had with Bailey in relation to selling the place is not sufficiently definite and certain to carry notice to Bailey that he and Diffie were the owners of the particular tract of land in question. We do not understand from his evidence that he did more than inform Bailey in a general way where the land lay. He did not describe it particularly nor designate it by name or otherwise. The conversation occurred, if at all, about two years before Bailey's purchase and was a casual conversation relating to his ownership in a tract of land in a certain locality, and not to any particular tract of land.

Nor do we think the conversation with the abstractor sufficient to show that Ford had any interest in the real estate in question prior to his purchase thereof on November 3, 1911. As we understand it, the conversation referred to a *lis pendens* notice which had been filed in the partition suit by Ford when he commenced the original action in this case on April 5, 1912, and did not concern any transaction prior to the purchase of the land by Bailey from Wilson on November 3, 1911. We do not understand from the abstractor's testimony that he went into detail and informed Bailey that Ford claimed or had an interest in the real estate in question. The positive evidence and circumstances in this case fail to convince us that C. C. Bailey had actual notice of Ford's deed prior to his own purchase of the real estate. We think a

clear preponderance of the evidence shows to the contrary.

Again, it is contended by appellant, C. C. Bailey, that his purchase of the land was not affected by the *lis pendens* filed by R. L. Wilson on June 27th, 1911, when he brought suit to cancel his deed to J. D. Diffie and J. P. Ford of date October 16, 1909; nor by the *lis pendens* filed by appellee when he brought suit on April 5, 1912, to restore his lost deed and partition the land.

The rule of *lis pendens* and its effect was a subject of decision by this court in the recent case of *Cherry v. Dickerson*, 128 Ark. 572. The purpose of the rule is to prevent the alienation of property which is the subject of litigation during the pendency of the suit, and by so doing to give full effect to any decree or judgment which might be rendered in the case in favor of the party filing the *lis pendens*. A *lis pendens* is not actual notice to any one who does not know the contents, by inspection or otherwise. A purchaser of the property during the pendency of the suit under a *lis pendens* is constructively bound by the decree or judgment rendered in the case in favor of the party filing the *lis pendens*, and no further. The purchaser is not constructively bound by the claims of a party to a suit who filed no *lis pendens* setting forth the claim. Nor is a purchaser bound constructively under a *lis pendens* beyond the life of the suit. It was said in the case of *Cherry v. Dickerson*, *supra*: "The authorities are practically in accord in holding that after the dismissal or abandonment of an action, without express reservation, the *lis pendens* does not continue as constructive notice so as to affect the rights of parties intervening between the dismissal or abandonment and reinstatement or commencement of the action anew."

In the instant case, the first *lis pendens* relied upon to constructively bind the Baileys is the one filed by R. L. Wilson in aid of his suit to cancel his deed he executed

to J. D. Diffie and J. P. Ford. Ford, appellee in the case at bar, was a party defendant in that case and was served with process. He claimed no right to the property by answer or under the *lis pendens*. The suit was settled and dismissed by Wilson conveying the territorial patent right to J. D. Diffie and in consideration thereof, J. D. Diffie reconveying the land in question to R. L. Wilson. The deed in settlement was dated July 8, 1911. Wilson did not buy until nearly four months after the date of the deed executed in settlement of the suit. While the record does not show the date of the dismissal, it clearly follows from the evidence in the case that the suit was abandoned at least as early as July 8, 1911, the date on which the deed in settlement was executed. There is no evidence in the record showing that R. L. Wilson ever actually inspected the *lis pendens* notice or that he knew of its contents prior to his purchase. Applying the rule and its effect, as announced in the case of *Cherry v. Dickerson*, to the conclusion of facts reached by the court in the instant case, the purchase of C. C. Bailey of November 3, 1911, was not affected by Wilson's *lis pendens*, and C. C. Bailey was therefore a *bona fide* purchaser of said lands for value.

The *lis pendens* filed by Ford on April 5, 1912, when he instituted the original suit in this case, can in no way affect the rights of the Baileys, because the C. C. Bailey purchase antedated the filing of this *lis pendens* some five or six months.

The learned chancellor therefore erred in finding that C. C. Bailey purchased said lands with either actual or constructive notice of appellee's claim under his lost or destroyed deed of date October 16, 1909.

The decree is reversed and remanded with direction to dismiss the bill for the want of equity.



## RAGSDALE v. STATE.

Opinion delivered January 21, 1918.

1. **CHANGE OF VENUE—CRIMINAL CASE—NAME OF COURT TO WHICH CAUSE IS SENT.**—The transfer of a cause, on change of venue, from the Johnson Circuit Court to the "Morrilton Circuit Court," is only a clerical error which can result in no prejudice to the defendant, where the cause was transferred to the circuit court of Conway county, of which county Morrilton is the county seat.
2. **JUDICIAL NOTICE—COUNTY SEATS.**—This court takes judicial knowledge of the fact that Morrilton is the county seat of Conway county, and that the Conway Circuit Court is held at Morrilton.
3. **CARNAL KNOWLEDGE—CONVICTION UPON TESTIMONY OF PROSECUTRIX.**—In a prosecution for carnally knowing a female under sixteen years of age, a conviction may properly be had upon the uncorroborated testimony of the prosecutrix alone.
4. **TRIAL—OPENING STATEMENT—IMPROPER LANGUAGE.**—In a prosecution for carnal knowledge, remarks of the prosecuting attorney held not prejudicial to the defendant.
5. **TRIAL—IMPROPER ARGUMENT—ADMONITION BY COURT.**—In a criminal trial the prosecuting attorney made improper remarks in argument. Where the court rebuked the attorney in the presence and hearing of the jury, and said that such statements had been excluded from the jury's consideration, the court's remark is tantamount to admonishing the jury not to consider the statements.

Appeal from Conway Circuit Court; *A. B. Priddy*, Judge; affirmed.

*J. T. Bullock, J. J. Montgomery and Hays & Ward*, for appellant.

1. There was no transcript filed in the circuit court of Conway County and it had no jurisdiction. The transcript was imperfect and there were file marks showing it was filed. Kirby's Digest, § § 2326-7-8; 38 Ark. 221; 36 *Id.* 237; 48 *Id.* 94; 72 *Id.* 145; *Ib.* 613; 102 *Id.* 653. There is no such court as the Morrilton Circuit Court.

2. Appellant should have been acquitted on the testimony. The State relied on the testimony of the prosecutrix alone, and she was contradicted in many ways. Her testimony was not corroborated.

3. The remarks of the prosecuting attorney were highly improper and prejudicial and the jury were not properly admonished. 58 Ark. 473; 12 Cyc. 571 and notes; 73 Ark. 453; 58 *Id.* 353; 65 *Id.* 619; 70 *Id.* 305.

*John D. Arbuckle*, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The testimony is sufficient. Kirby's Digest, § 2008; 65 Ark. 508. No corroboration of the prosecutrix was necessary. 63 Ark. 504. The jury were the judges of the weight of the evidence. 104 Ark. 162; 101 *Id.* 51.

2. The remarks of counsel were not improper nor prejudicial, but if so, the court corrected the error, if any, by its vigorous action. 84 Ark. 16; 81 *Id.* 25; 80 *Id.* 495; 65 *Id.* 475; 75 *Id.* 246; 67 *Id.* 365; 82 *Id.* 64; 88 *Id.* 602; 105 *Id.* 608.

3. A proper transcript was filed here before trial. 35 Ark. 118; 15 *Id.* 395; 19 *Id.* 178; 73 *Id.* 148; 16 S. W. 816. The "Morrilton Circuit Court" was a mere clerical error, not prejudicial and immaterial. 188 Ill. 545; 81 Mich. 240; 64 Cal. 369.

4. The motion in arrest was properly overruled. Kirby's Digest, § 2427.

HUMPHREYS, J. On the 2nd day of October, 1917, appellant was tried and convicted in the Conway Circuit Court, on change of venue from Johnson Circuit Court, of carnally knowing Viola Dunn, a female person under the age of sixteen years, and sentenced to imprisonment for one year. Motions in arrest of judgment and for new trial were filed and overruled, and from the judgment of conviction an appeal has been prosecuted to this court.

(1-2) It is insisted that the Conway Circuit Court acquired no jurisdiction of the case because an imperfect transcript was lodged in the Conway Circuit Court. Appellant went to trial without suggesting that the transcript was incomplete until the verdict was returned and a motion in arrest of judgment had been filed. Thereupon

the sentence was suspended and no other steps were taken until the transcript was perfected and filed. This proceeding was in keeping with the rule of practice laid down in *Bixby v. State*, 15 Ark. 395; *Green v. State*, 19 Ark. 178; *Binns v. State*, 35 Ark. 118, and *Lee v. State*, 73 Ark. 148. But it is said there is no file mark on the transcript and that this case is ruled by *Burris v. State*, 38 Ark. 221, and *Ball v. State*, 48 Ark. 94. In these cases there was nothing to show that the transcript had become a part of the record in the court to which the causes were transferred. In the instant case the record shows that a transcript was filed in the Conway Circuit Court. After the court had read the indictment, an objection was interposed to the reading thereof, for the reason that the same was not a certified copy of the original indictment. It would be far-fetched to treat this as an objection to the jurisdiction of the court over the case. No prejudice resulted to appellant on account of reading the indictment as it was an exact copy of the one contained in the amended transcript. In the case of *Lee v. State*, 73 Ark. 148, Mr. Chief Justice Cockrill, in referring to the statute providing that a judgment of conviction should be reversed for prejudicial errors only, said: "The purpose of the statute was to obviate the necessity of reversing judgments of conviction on account of mere errors of form which do not affect the substantial rights of the defendant." The instant case was transferred from Johnson Circuit Court to Morrilton, Arkansas, and set for Tuesday of the first week of the next term of the Morrilton Circuit Court. Appellant contends that there is no such court known to the laws of Arkansas. This court knows judicially that Morrilton is the county seat of Conway County and that the Conway Circuit Court is held at Morrilton, the county seat. Knowing that much judicially, the conclusion is irresistible that the transfer of a criminal case from Johnson Circuit Court to Morrilton for trial in the Morrilton Circuit Court is a transfer of the case to the Conway Circuit

Court. It would be extremely technical to hold otherwise. The transfer of the cause to Morrilton, Ark., for trial in the Morrilton Circuit Court was a clerical error which resulted in no prejudice to the substantial rights of appellant.

(3) It is contended by appellant that the evidence is insufficient to support the verdict. The gist of the argument of learned counsel for appellant in support of this contention is, that the State relied upon the evidence of the prosecutrix alone for conviction, which was contradicted in many ways. It was within the province of the jury to pass upon the credibility of the witness, and the weight to be attached to her evidence. She was not an accomplice in the crime and the law does not require her testimony to be corroborated. There can be no question that she gave substantial testimony. She testified that appellant had sexual intercourse with her on two occasions in Johnson County, in the year 1916, when she was 14 years of age. On appeal this court will not disturb a verdict supported by substantial legal evidence. *Coats v. State*, 101 Ark. 51; *Rhea v. State*, 104 Ark. 162.

(4) The prosecuting attorney was permitted to say in his opening statement that, "The defendant, John Ragsdale, began to abuse the little girl as far back as it is possible for a human being to do such a thing, and he continued to have intercourse with her from that time in Pope County, up until the year 1916, when they moved from that county to Johnson County, where he had the intercourse with which he stands charged in this indictment."

In passing upon the latitude allowed counsel in an opening statement, this court has said: "The object of the opening statement is to give the jury an outline of the evidence to be introduced and the nature of the issues to be tried. Counsel have no right to rehearse facts which can not be introduced in evidence, and the court should not allow counsel to state matters foreign to the issues, and which have a tendency to excite the

prejudice of the jury. The privilege allowed to counsel in this regard is largely within the discretion of the trial court, but is subject to review on appeal where it appears that there is a manifest abuse of its exercise." *Coats v. State*, 101 Ark. 51.

It is true the statement contained matter not subsequently proved, but there is nothing to show that it was made in bad faith. The matters set forth in the statement were not foreign to the issue, and might have been offered in proof. There was no manifest abuse in the exercise of the court's discretion in permitting the statement.

(5) In his closing argument, the prosecuting attorney made two statements in reference to appellant's mistreatment of his wife. Objections were made and sustained. In sustaining the first objection the court said, "Mr. Ragon, the court excluded that from the jury and you should not argue that. Proceed now with your argument." In sustaining the second objection the court said, "Mr. Ragon, the court told you a while ago not to repeat that argument, and if you persist in doing so I shall be compelled to fine you—but your time is up now."

The appellant saved an exception because the court did not specifically admonish the jury to disregard the statement. The court rebuked the attorney in the presence and hearing of the jury and said that the matters covered in the statement had been excluded from the jury's consideration. It was tantamount to admonishing the jury not to consider the statement.

It is insisted that the case should be reversed because the attorneys for the State persistently attempted to draw damaging facts foreign to the charge into the case. The facts related to appellant's misconduct toward his wife. The court promptly excluded such evidence whenever objection was made, and also excluded any remarks made by counsel for the State pertaining to matters foreign to the issues, and refused to permit further inquiry along those lines. We think the action of the

court in excluding all these matters was sufficient to safeguard appellant's right to a fair and impartial trial.

The judgment is affirmed.

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INSURANCE COMPANY OF NORTH AMERICA v. KEMPNER

Opinion delivered January 14, 1918.

1. **INSURANCE — APPRAISEMENT OF DAMAGES — VOID PROVISION.**—A clause in a policy of fire insurance binding the parties to an appraisal of the damages is void under Kirby's Digest, § 4382.
2. **ARBITRATION AND AWARD—FIRE INSURANCE LOSS—AGREEMENT FOR APPRAISEMENT—REVOCATION.**—An agreement in a fire insurance policy provided for the ascertainment of the amount of the loss by the appointment of certain appraisers. *Held*, this agreement aside from Kirby's Digest, § 4382, amounted to a common law submission to arbitration of a disputed question of fact, and such an agreement is revocable at any time before the award, at the will of either party. (The only exception to the rule is where the submission is founded upon an independent consideration other than the mutual agreement to arbitrate.)
3. **ARBITRATION AND AWARD — REVOCATION OF SUBMISSION.**—The method of revocation of a submission to arbitration must be of equal dignity with the form of the agreement for submission, for example, if the agreement to submit is in writing, the revocation must be in writing.
4. **ARBITRATION AND AWARD—REVOCATION OF AGREEMENT TO SUBMIT—REASONS.**—The grounds for the revocation, by one of the parties, to an agreement to submit to arbitration, are immaterial.
5. **ARBITRATION AND AWARD—REVOCATION—NOTICE TO APPRAISERS.**—The appraisers or arbiters must be notified of the revocation of the agreement to submit.

Appeal from Pulaski Circuit Court, Third Division;  
*G. W. Hendricks*, Judge; affirmed.

*Mehaffy, Reid & Mehaffy*, for appellant.

1. The contract of arbitration was in its nature irrevocable. 49 Atl. 738; 197 Pa. St. 404; 18 Phila. 307; 76 Ark. 153.

2. The award was never in fact revoked. The submission was in writing and the revocation must also be

in writing. 5 C. J. 57; 1 Cald. (Tenn.) 197. Notice must be given. 68 S. E. 902; 5 C. J. 58; 2 R. C. L. 368.

3. At any rate, the question of revocation was for a jury. 5 C. J. 192; 2 R. C. L. 386, 390; 44 Ark. 166; 76 Atl. 753; 146 Fed. 76; 39 *Id.* 52; 49 Atl. 745; 75 Ark. 198; 53 Pac. 498; 47 S. E. 82; 66 So. 558; 60 S. W. 1014.

*Moore, Smith, Moore & Trieber*, for appellees.

1. The contract was revocable. 31 L. R. A. (N. S.) 679; 91 N. W. 328; 2 L. R. A. 180; 47 L. R. A. (N. S.) 338, 400 and note; 2 R. C. L. 367, § 15, 368.

2. It was in fact revoked and notice was given. It was in writing. 2 R. C. L. 369, § 17; Morse on Arb. & Award (1 ed.) 231.

3. The umpire was disqualified. 32 So. 258; 97 N. W. 876; 66 N. E. 905; 34 S. W. 403; 39 Pac. 383.

4. The withdrawal of plaintiffs' appraiser dissolved the arbitration. 64 Atl. 63; 106 N. W. 507; 35 Atl. 13; 27 *Id.* 927; 106 N. W. 109.

5. Slagle was not disinterested. 97 N. W. 875; 137 N. Y. 137; 34 S. W. 401; 97 N. W. 877; 66 N. E. 905; 39 Pac. 380; 32 So. 258; 75 Ark. 198.

6. An award may be impeached when pleaded as a defense. 62 N. E. 146; 47 Pac. 436; 13 N. W. 252.

7. The tender was not unconditional.

McCULLOCH, C. J. Appellees owned a building in the city of Little Rock which was damaged by fire on April 10, 1916, and which was insured under policies issued to said owners by appellant companies. The policies contained clauses to the effect that the amount of any loss or damage should, in the event of disagreement, be ascertained by "two competent and disinterested appraisers," one to be selected by each party to the contract, and an umpire to be selected by the appraisers. There was a disagreement as to the amount of the damage to the building and on April 21, 1916, the said owners and the insurance company entered into a written agreement for the submission of the question to two ap-

praisers and an umpire selected in the manner specified in the policies. The owners selected Thalman as appraiser and the companies selected Slagle, and the two appraisers selected Casey as umpire. After these appraisers had taken oath as provided in the contract but before they entered upon the investigation to determine the amount of the loss, appellees made objections to Slagle serving as appraiser on the ground that he had frequently performed such services at the instance of the insurance companies and was not disinterested, within the meaning of the contract. On April 27, 1916, appellees' attorney addressed a letter to the representatives of the companies stating the grounds of objection to the service of Slagle and adding the following: "They (appellees) have just learned the facts, with respect to Mr. Slagle, and this is to notify you that they will not continue the appraisal unless and until you select some arbitrator other than Mr. Slagle, who is disinterested."

The companies replied, in writing, refusing to displace Slagle by the appointment of another appraiser in his stead, but insisted on Slagle and the umpire continuing the investigation and rendering an award, which was done. Thalman refused, on the request of appellees, to proceed further in the matter and the award was made without his participation in the proceedings. Thalman notified Slagle and Casey of his refusal to proceed with the investigation and informed them of the fact that he did so on instructions from appellees who objected to Slagle as an appraiser. These facts are undisputed.

The appraisal made by Slagle and Casey was for an amount less than the face of the policies. Appellees instituted this action on the policies for the full amount, disregarding the appraisal made by Slagle and Casey. The companies offered to settle for the loss on the basis of the appraisal and pleaded that as a defense. The trial court decided, upon the facts set forth above, that the appraisal was not binding on appellees and refused to submit to the jury any issue ex-



cept that as to the amount of the damage to the building. The only question presented on this appeal is whether or not, under the evidence adduced, there was an issue to be submitted concerning the appraisalment.

(1) The clause in the policy binding the parties to an appraisalment of the damages was rendered void by statute. Kirby's Digest, § 4382; *Firemens' Ins. Co. v. Davis*, 130 Ark. 576.

Learned counsel for appellants rely on the case of *Niagara Ins. Co. v. Boon*, 76 Ark. 153, as holding that an agreement for appraisalment entered into pursuant to the terms of a policy is irrevocable, but the cause of action in that case arose before the passage of the statute cited above and it has no application to a contract of insurance entered into since the statute went into effect.

(2) The agreement for appraisalment in the present case, treating it, as we must, as entirely disconnected from the void provision in the policies, amounted to no more nor less than a common law submission to arbitration of a disputed question of fact, and the rule is almost universally recognized by the authorities that such an agreement is revocable, at any time before the award, at the will of either party. See note to *Williams v. Branning Mfg. Co.*, 47 L. R. A. (N. S.) 337; 2 Ruling Case Law, p. 367.

The only exception to the rule is that when the submission is founded on an independent consideration other than the mutual agreement to arbitrate, it is not revocable at the will of one of the parties.

(3-4) It seems to be established by the weight of authority that the method of revocation must be of equal dignity with the form of the agreement for submission, that is to say, the revocation must be in writing if the agreement to submit was in writing. That requirement was complied with in the present case, for appellees' attorneys wrote to the adjusters unequivocally that the submission would be revoked unless Slagle was displaced by the selection of another appraiser. The adjusters re-

plied, refusing to make another selection and appellees accepted that decision as an end of the proceedings and so notified the adjusters. That was the necessary effect of the final correspondence between the parties. It is immaterial whether the grounds of the objections to Slagle were reasonable or not since it is seen that appellees had the absolute right to revoke the submission at will.

(5) Another requirement, it appears, is that the appraisers or arbitrators must be notified of the revocation. This was done verbally and the notice is not required to be in writing. Nor is it material how the notice was communicated to the appraisers. It was done in this instance by communication to Thalman the one selected by appellees, who in turn notified the other appraiser and the umpire. The revocation was made in substantial conformity with the common law rule on the subject and was sufficient to end the proceedings.

It is not claimed that there was any error in the court's charge to the jury submitting the issue as to the amount of the damage to the building.

Affirmed.

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MATTHEWS v. GEORGIA STATE SAVINGS ASSOCIATION.

Opinion delivered January 14, 1918.

1. **USURY—PAYMENT OF ATTORNEY'S FEES BY BORROWER.**—The statute against usury is not violated, where the lender requires the borrower to pay the cost of examining the title to the land offered as security, or of inspecting and reporting upon any property offered as security, or preparing papers and doing every formal act necessary to the security of the loan, the loan bearing interest at the rate of 10 per cent. per annum.
2. **USURY—INSURANCE.**—An agreement by a borrower to take out insurance on the property, which secures the loan, does not constitute usury, in the absence of a showing that the policy was taken out as a cloak or device to evade the statutes.
3. **USURY—DEFAULT IN PAYMENT.**—A loan was secured by a bond and mortgage, the bond providing that the nonpayment of three installments of principal or interest after the same shall fall due, shall authorize the lender to proceed to enforce the payment of

the loan together with the interest due thereon; *held*, the bond did not provide for the exaction of usury.

4. USURY—DATE OF EXECUTION OF AGREEMENT.—A contract is not usurious, when the parties acted in good faith, where 10 per cent. interest is charged, where the agreement was dated May 21, 1915, but was not closed and the money delivered until June 9, 1915.
5. USURY—PARTIAL PAYMENTS.—Money was loaned to appellant, the agreement providing that the principal and interest should be paid in partial payments. *Held*, under the evidence that the agreement was not usurious.

Appeal from Clay Chancery Court, Western District; *Archer Wheatley*, Chancellor; reversed in part, affirmed in part.

*F. G. Taylor*, for appellant.

The loan is usurious. The payment or charge for interest prior to the time the money was received and the payment of a commisison to Brown and the expenses of McRaven constitute usury. Webb on Usury, § 308, and note 1; 29 Cyc. 956 and notes 27-8-9; 54 Ark. 566; 29 Cyc. 975 and note 21; 105 Ark. 653.

*Huddleston, Fuhr & Futrell and Hitck & Denmark* (of Georgia), for appellees.

1. The loan is not usurious. 129 Ark. 167; 74 Ark. 241; Webb on Usury, § 219.

2. Brown's fee for examining the title and preparing the abstract and McRaven's expenses did not make the loan usurious. 39 Cyc. 982; Webb on Usury, § 323; 51 Ark. 548; 55 *Id.* 268; 62 *Id.* 431, etc. See also 39 Cyc. 945, 654, 985; 29 A. & E. Enc. Law 486, 505-6-8; Webb on Usury, § 119, etc., 221; 37 Ark. 534; 68 *Id.* 162.

3. The partial payment plan was correctly applied here. Webb on Usury, § 219; 1 Cranch (C. C.) 498; 22 Fed. Cases, No. 13107; 13 Peters 359; 21 Fed. Cases No. 12156a; 1 Johns Chy. 13; Southerland on Damages, § 379.

4. On the cross-appeal Brown was not appellants' agent and his fee was not chargeable to appellant. Nor did it make the loan usurious. 51 Ark. 534, 548; 63 *Id.*

385; 123 Ark. 612; 126 Ark. 155; 67 *Id.* 159; 2 C. J. 656, 1224; 31 Cyc. 1224; 105 Ark. 653.

5. McRaven's expenses were properly chargeable to appellant. 3 Cyc. 982; 62 Ark. 431; Cent. Digest, § § 113-116.

6. The insurance premium was a proper charge against appellant. 27 Cyc. 1077.

#### STATEMENT OF FACTS.

J. A. Matthews instituted this action in the chancery court against the Georgia State Savings Association and A. D. McRaven to cancel, on the ground of usury, a mortgage executed by him on certain real estate situated in the Western District of Clay County, Arkansas, to said association to secure it for a loan made to him. The association defended on the ground that there was no usury in the transaction and filed a cross-complaint asking for a judgment against Matthews for the amount of his debt and for a foreclosure of the mortgage given to secure it.

According to the testimony of J. A. Matthews himself, he dealt with A. L. Brown of Corning, Arkansas, as agent for the Georgia Savings Association. Brown charged him, and he paid Brown, the sum of \$35 as a commission for procuring the loan. McRaven, an agent of the association, came from Little Rock, Arkansas, to Corning, Arkansas, to inspect the property and Matthews paid one-half of his railroad fare which amounted to \$7.50. Matthew executed his bond to the association for the sum of \$2,800 with 10 per cent. interest per annum from date until paid and the date of the bond was the 21st day of May, 1915. A deed of trust was executed by Matthews to the association on the same day upon the real property involved in this suit for the purpose of securing the bond and McRaven has been substituted as trustee in said deed of trust. By the terms of the bond, Matthews obligated himself to pay to said association at its place of business in Savannah, Georgia, on or before the last busi-

ness day in each month until ninety-six monthly payments have been paid, the sum of \$40.79, which is made up of the sum of \$29.15 as installment of principal and \$11.64 as installment of interest upon said loan. It was also stipulated in the bond that he should take out and keep paid the sum of \$2,800 fire insurance and \$2,800 storm insurance. The money was not received by Matthews until June 9, 1915. He commenced paying installments in the sum of \$40.79 on the last day of June, 1915, and made all the payments monthly thereafter until January 1, 1916.

According to the testimony of Edward W. Bell, he was the managing vice-president and had had charge of the business of the Georgia State Savings Association since October, 1890. The letter of acceptance outlining the terms and conditions under which the association would make a loan to Matthews was written by him on the 6th day of May, 1915, at the association's office in Savannah, Georgia. In January, 1915, the association ratified the appointment of A. L. Brown as its local attorney and correspondent at Corning, Arkansas. The association never gave him authority in the matter of procuring or granting loans. The association agreed to consider such applications from his customers as came up to its requirements. Where such customers made formal applications for a loan the association made the necessary investigation as to property values, etc., and submitted the matter to its board of directors. If accepted by the board of directors, the applicant was then notified of the terms and conditions under which the loan would be granted. The association never agreed to pay Brown any commission or fee in connection with procuring or making loans and Brown never had any authority from the association to charge any commission therefor. The association never paid Brown any fee or commission for the loan made to Matthews and did not know about any commission having been paid him and received no part thereof. Brown was named by the association

as an attorney satisfactory to the association to make abstracts and examine titles to real estate upon which loans are made in his county. A. D. McRaven was a loan inspector for the association in charge of the section of Arkansas in which the town of Corning is situated. He had no authority to make any contract on behalf of the association and worked on a salary paid him by the association. The association had no knowledge that Matthews paid to McRaven any part of his traveling expenses or inspection fee in examining the land in question. The \$2,800 loan to Matthews was closed on June 9, 1915. When the check of the association for this amount payable to the order of Matthews was issued and sent to A. L. Brown and Matthews was notified to call on him at once and receive the money on June 8, 1915, the association wrote to Brown that the loan had been granted and that the first installment on the contract, \$40.79, would fall due and must be paid by the last day of the present month and that he would also be due the association a like amount by the last day of each month thereafter until ninety-six installments had fallen due and had been paid in accordance with the terms of the contract.

The testimony of the vice-president was corroborated by that of the bookkeeper of the association. Other testimony will be stated or referred to in the opinion.

The chancellor found that there was no usury in the transaction and a judgment was accordingly entered against Matthews in favor of the association for the balance due it. A decree of foreclosure of the deed of trust given to secure the debt was also entered of record.

The plaintiff, Matthews, has appealed, and the defendant has taken a cross-appeal.

HART, J., (after stating the facts). We will first consider the cross-appeal. The chancellor found that A. L. Brown was the agent of the Georgia State Savings Association and was paid a commission of \$35, but the chancellor did not find that such commission was paid

with the lender's knowledge express or implied. After giving Matthews credit for the full amount of the commission paid with interest, the court rendered a judgment in favor of the association for the balance due it and entered a decree foreclosing the deed of trust securing the loan.

In the case of *Vahlberg v. Keaton*, 51 Ark. 534, the court said:

"The lender may receive for the forbearance of money 10 per cent. per annum and no more. In excess of that his agent can receive no bonus from the borrower. If the agent do receive from the borrower a bonus in excess of the highest lawful interest, either with his knowledge, or under circumstances from which the law will presume he had knowledge, then the transaction is usurious; while, if the agent received the excessive bonus without his knowledge, and under circumstances from which his knowledge could not be reasonably presumed, the transaction would not be usurious."

(1-3) The bond provided that the loan in question should bear interest at the rate of 10 per cent. per annum, the highest legal rate in this State. There is nothing in the record tending to show that the association knew that Brown was charging or receiving a commission in connection with the loan. Indeed, the evidence shows that no commission was paid to Brown. It is true that Matthews testified that he paid him a commission of \$35.00 but he was mistaken in so designating the amount paid to Brown. The amount was paid to Brown as an attorney's fee for an examination of the title to the property mortgaged. The association would not make loans unless an abstract of title was furnished prepared by a lawyer in whom they had confidence. Brown was such a lawyer and was designated by the association as one whose examination of titles would be accepted. It was shown that Brown did not have any authority to make a loan for the association and there is nothing in the record to show that the payment of the \$35 was a device to

evade our statute against usury. The lender may require the borrower to pay the cost of examining the title to land offered as security or of inspecting and reporting upon any property offered as security, or preparing papers and doing every formal act necessary to the security of a loan. 39 Cyc. 982; Webb on Usury, paragraphs 81, 318 and 324; *Goodwin v. Bishop*, 145 Ill. 421; *Ammondson v. Ryan*, 111 Ill. 506; *Liskey v. Snyder* (Supreme Court of Appeals of West Virginia), 49 S. E. 515; *Mackey v. Winkler* (Minn.), 29 N. W. 337; *Daley v. Minnesota Loan & Investment Co.* (Minn.), 45 N. W. 1100; *American Mortgage Co. v. Woodward* (S. C.), 65 S. E. 730; *Harger v. McCullough*, 2nd Denio (N. Y.) 119; *Eaton v. Alger*, 2nd Keyes (N. Y.) 41, and *Cobe v. Guyer*, 237 Ill. 516, 86 N. E. 1071. The theory on which the borrower is required to pay the cost of the examination of the title is not that he employs the conveyancer but that the lender is entitled to charge the borrower for the expenses to which the lender may be put in making the loan. This principle applies only to expenditures made in good faith. It is evident from the record that the \$35 charged Matthews by Brown here was for services in abstracting the title and there is nothing in the record to show that it was a shift or device to conceal usury.

It may also be here stated that the traveling expenses of the inspector paid by Matthews were proper charges under the authorities just cited. See also *Smith v. Wolf* (Iowa), 8 N. W. 429, and *Kent v. Phelps*, 2nd Day (Conn.) 483.

It is also deducible from the above authorities that an agreement by a borrower to take out insurance on the property does not constitute usury unless it is shown that the policy was taken out as a cloak or device to evade the statutes.

The bond contained a stipulation that the non-payment of three installments of principal or interest after the same shall fall due shall authorize the association



to proceed to enforce the payment of the loan together with the interest due thereon. This provision has reference to the amount of the principal and the interest due thereon at the time the option is acted on, and does not refer to the interest that would accrue subsequent to such time if no action were taken on the option.

Therefore the note is not in this respect usurious. *Eldred v. Hart*, 87 Ark. 534; *Graham v. Fitts*, 53 Fla. 1046, 13 A. & E. Ann. Cas. 149, and *Goodale v. Wallace* (S. D.), 9 A. & E. Ann. Cas. 545.

Section 5385 of Kirby's Digest, provides the rule for computing interest where partial payments have been made. It is as follows:

"In calculating interest, where partial payments may have been made, the interest shall be calculated to the time when the first payment shall have been made, and such payment shall be applied to the payment of such interest; and if such payment exceed the interest, the balance shall be applied to diminish the principal, and the same course shall be observed in all subsequent payments."

(4-5) Counsel for appellees have prepared and filed with their brief an itemized statement showing the amount due by calculating the interest as provided by the statute. As stated above the bond was dated the 21st day of May, 1915, and the interest was to be payable from date. The transaction was not closed and the money forwarded to Matthews until the 9th day of June, 1915. Hence it is claimed that this constituted usury. The record does not show that this was done as a device for hiding a usurious contract. On the other hand the circumstances of the loan show good faith on the part of the association. It is evident that the delay was unavoidably incident to the completion of the transaction and that there was no intent on the part of the association to charge usurious rate of interest. This is shown by the circumstances attending the consummation of the loan. The bond provided that the \$40.79 monthly install-

ment of principal and interest should be paid on the last business day of each month. No attempt was made by the association to collect any interest for the month of May. On the contrary at the time the loan was closed up, and it wrote Matthews on the 8th day of June, 1915, that the money had been forwarded, it notified him that the first installment would be due on the last day of that month and for each succeeding ninety-six months thereafter. Under this construction which was placed by the parties at the time the transaction was closed up there were only nine days in the month of June for which interest was charged. Under the rule of partial payments as laid down by our statutes as shown by the illustrated statements filed with the briefs, these nine days could not in any event make the contract usurious. Moreover the circumstances of the loan show good faith on the part of the association and the delay was not unreasonable. 39 Cyc. 956.

It follows that the chancellor was right in holding that the transaction did not constitute usury but that he erred in holding that Matthews was entitled to the \$35 paid Brown.

For his error the decree will be reversed and the cause remanded with directions to enter a decree in accordance with this opinion and for further proceedings according to law.

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### WELCH v. WELCH.

Opinion delivered January 14, 1918.

1. **REFORMATION OF DEEDS—FRAUD AND MISTAKE.**—Equity will reform written instruments only, (1) where there is a mutual mistake, and (2) where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties.
2. **DEEDS—REFORMATION—FRAUD AND MISTAKE.**—A father deeded all of his lands, consisting of 480 acres, to his son, appellee. Where it appeared that the father (deceased) only intended to convey eighty acres to appellee, and that he conveyed the larger tract be-

cause of fraud practiced by appellee, equitable relief will be granted at the instance of other heirs of deceased.

3. REFORMATION OF DEEDS—FRAUD AND MISTAKE—PROOF.—Parol evidence is admissible in an action to reform an instrument on the ground of fraud and mistake, but the evidence to warrant a reformation must be clear and convincing.
4. DEEDS—REFORMATION—EVIDENCE—DECLARATIONS OF GRANTOR.—W. and his wife deeded certain property to their son, appellee; appellants, other children of W., brought an action after W.'s death, to reform the deed on the ground that W. had not intended to include all the land mentioned in the deed, and that appellee had practiced fraud in the procurement of the deed. *Held*, declarations of W. and his wife, made after the execution of the deed to appellee, as to what disposition he intended to make of the lands, are inadmissible in evidence.

Appeal from Greene Chancery Court; *C. D. Frierson*, Chancellor; affirmed.

*Huddleston, Fuhr & Futrell* and *Jason L. Light*, for appellants.

1. Disinheritance of children by a parent must be traced to one or more of three causes: (1) Estrangement of parent from child; (2) some form of insanity; (3) fraud. No estrangement nor insanity is shown. But fraud and overreaching are shown by many strong circumstances and declarations of parties. The declarations of the grantors were competent evidence. 123 Ark. 134; 99 Mass. 88; 61 N. E. 426; 2 *Id.* 925.

2. The burden of proof was on the donee in the deed. 24 Atl. 645. A voluntary gift is conclusively fraudulent as to creditors, and this should be the rule where a gift to one child disinherits the brothers and sisters. 188 S. W. 321; 52 N. Y. Supp. 471; 62 Atl. 736; 33 S. E. 517; 83 Am. Dec. 593; 127 Am. St. 1107; 57 Barb. 458; 81 N. E. 1135.

The grantors were clearly imposed on. The declarations of both grantors and grantee and all the circumstances show a clear case of fraud and imposition and the decree should be reversed.

*Block & Kirsch*, for appellees.

1. No presumption of fraud or undue influence arises here. 17 Am. & Eng. Ann. Cas. 989; A. & E. Ann. Cas. 1915 D, 711; 81 N. E. 403; 91 S. W. 475; 24 Oh. Ct. Ct. 397; 117 S. W. 1177; 72 N. E. 1121; 47 So. 117; 106 N. W. 675; 53 S. E. 779. Confidential relations alone are not sufficient. 90 Atl. 936; 114 Pac. 33; 167 S. W. 1036; 135 Pac. 333; 62 So. 505. See also 2 Pom. Eq. Jur. (3 ed.), § 962.

2. No fraud nor undue influence was proven. The declarations of a vendor made after the conveyance, in the absence of the vendee, are not admissible to impeach the title. 40 Ark. 237; 43 *Id.* 320; 14 *Id.* 305; 79 *Id.* 418; 90 *Id.* 149; 48 *Id.* 169. In 123 Ark. 134 the declarations were made anterior to the deed. The burden was on the plaintiffs. Fraud is not proven and the chancellor so found. The decree should be affirmed.

#### STATEMENT OF FACTS.

Appellants instituted suit against appellees in the Greene Chancery Court to set aside a deed executed by W. M. Welch and Margaret Welch, his wife, on the 24th day of May, A. D. 1914, to C. W. Welch, describing the following lands in Greene County, Arkansas, to-wit: Southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 13, township 17 north, range 3 east; the northeast quarter, the west half of the southeast quarter, the east half of the southwest quarter and the east half of the northwest quarter, all in section 18, township 17 north, range 4 east, alleging in substance that C. W. Welch procured the deed to all of said lands, except the eighty-acre tract known as the home place, through fraud and deceit. John Welch, one of the plaintiffs, made an additional allegation that he was the owner by gift from his father, W. M. Welch, of the southeast quarter of the northwest quarter, the northeast quarter of the southwest quarter, section 13, township 17 north, range 3 east.

William Gray and Ruth Faulkner refused to join the petitioners in the prosecution of the suit and filed no an-

swer to the bill. A separate response was filed by J. D. Block as guardian *ad litem* for Dixie Welch, Coleman Welch and Holland Welch, grandchildren of W. M. Welch, deceased, denying all the material allegations of the bill, claiming to be owners in fee of said real estate under the deed sought to be canceled. Mrs. Willie Welch, wife of C. W. Welch, grantee in said deed, filed separate response adopting the answer of the guardian *ad litem* for her children, and claiming a dower interest in all of said real estate.

Joe A. Thompson was administrator of the estate of Charley Welch, deceased, and he answered, denying all material allegations in the original bill with reference to his intestate procuring moneys from the estate of Margaret Welch, deceased. It is unnecessary to set out the allegations with reference to the personal estate of Margaret Welch, deceased, contained in the original bill, appellants having dismissed that part of their bill.

The appellants are children and grandchildren of W. M. Welch, deceased.

The court heard the case upon the pleadings and written proofs and sustained the deed as to all the lands except the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter, section 13, township 17 north, range 3 east. As to the land just described, the court canceled the deed and divested the title out of both plaintiffs and defendants and vested same in John Welch.

The court incorporated in the decree a finding and holding to the effect that the burden of proof rested upon appellants, and overruled appellants' contention that the burden rested upon the appellees to sustain the deed.

The substance of the evidence is about as follows: On May 24, 1904, W. M. Welch, the grantor in the deed, called at the office of J. D. Block, an attorney, and had him draw the deed from himself and wife, Margaret, to C. W. Welch, his son, handing him a tax receipt from which to get the description of the land. Block dictated the deed and when W. M. Welch returned after a short

absence he read the deed to him. The land was described by calls and the deed recited 480 acres, more or less. A life estate was reserved in himself and wife. The lands above described constituted all the lands owned by W. M. Welch. W. M. Welch took the deed downstairs, and, after same was executed and acknowledged, he returned to the office, handed Mr. Block \$10 for his services and handed the deed to his son, C. W. Welch, who had appeared for the first time, telling him to go and record same. The deed was not recorded until the 28th day of April, 1905, about one year after its execution. C. W. Welch was the youngest son and had resided with his father from infancy, and for a number of years prior to the execution of the deed, and thereafter until his death, managed his father's business. C. W. Welch was the only member of the family who could read and write. His father depended on him in all transactions requiring writings. He paid the taxes for his father and attended to all business matters for him. He counseled with both his father and mother concerning the business. His mother usually kept the money and on his suggestion would pay the obligations incident to the business in which they were engaged. W. M. Welch placed John Welch, his son, in possession of the southwest quarter of the northwest quarter, the northeast quarter of the southwest quarter of section 13, township 17 north, range 3 east, on the 24th day of December, 1894, under promise that he would deed said tract of eighty acres to him. John Welch has continuously lived upon said tract and made valuable improvements thereon. This tract of land was included in the deed sought to be canceled. Prior to the execution of the deed, W. M. Welch deeded tracts of about equal value to some of his other children. He and his wife stated many times, both before and after the execution of the deed, that they intended to divide their lands equally between their children. The grandchildren were always included in the statements. All of their children lived near by and seemed to stand equally in the affection of both father and mother. The only preference ever ex-

pressed with reference to a division of the property was to the effect that C. W. Welch was to have the home eighty or home place. No member of the family knew of the execution of the deed until after the death of C. W. Welch. His wife, Mrs. Willie Welch, found it in his trunk after his death. She maintained silence with reference to the discovery until after the death of W. M. Welch. C. W. Welch went to Oklahoma for a time and W. M. Welch either went there with him or to him and remained there until his son's death. After the death of his son, C. W. Welch, he returned to his Arkansas home and remained there until his death on the 17th day of February, 1915. On two occasions there was some disturbance in the family. C. W. Welch got into trouble and there was a little complaint about the amount expended in his defense. In a statement to Alex Witcher, C. W. Welch stated that his mother "had no right to get mad and treat him like she was, that there was a time coming when there would be something to kick for, and also made the remark that John and some of them were sulking around him, mad at him, and said they have got no right to say anything, it don't cost them anything. \* \* \* He (C. W. Welch) made it appear that probably she (Margaret Welch) would think that she was going to deed him eighty acres and perhaps it would be a whole lot more or all of it, or something of that kind." On the other occasion, some trouble had been brewing with reference to the Bug Gray estate. C. W. Welch stated to J. H. Cade, in the presence of Lawrence Smith in the year 1906, that "the heirs were sore at him the way the suit was settled and they would be sorer than that when the Doc Welch (referring to W. M. Welch) estate was settled, that the old folks thought that he only had a deed to eighty acres but that he had a cinch on it all; that he was paying the taxes and the whole estate belonged to him; that he had it fixed. \* \* \*"

Before leaving for Oklahoma, C. W. Welch suggested selling the land, and referred to it as Pa's land. In 1906, Lawrence Smith heard a conversation between C. W. Welch and his father, W. M. Welch, in which C. W. Welch

said, "Pa, make me a will to everything you have got and you won't have to look after it," and the old man said, "I godlins, I have got other children besides you," and the old lady sort of shed a few tears and said "she could not think of leaving Bug Gray's children out; that they had other children for the stuff to go to, part of it, their part." On another occasion, when Tom Rogers was helping C. W. Welch put up a telephone post on the home place contrary to the father's will, Rogers was teasing Charley, and suggested that he would die laughing if the old man would come up with an ax and cut the telephone post down. C. W. Welch said: "He dared him to, and looked across to the walnut tree and said, this one is on mine, it is not on his. I dare him to touch it; as to the others, I can't say, but this one he knows better; I dare him to touch it."

The record also contains statements made at various times after the execution and delivery of the deed from W. M. Welch to C. W. Welch, by both W. M. Welch and his wife, to the effect that they intended for Charley to have the home tract of eighty acres, and that they intended to divide their lands equally between their children. It was also shown that a short time prior to his death, W. M. Welch prepared, on several occasions, to go to town and divide his property among his children. It is not shown, however, that these statements were made or acts done in the hearing or presence of C. W. Welch.

HART, J., (after stating the facts). (1-2) The plaintiffs are children and heirs at law of W. M. Welch, deceased. They admit in their complaint that their father intended to convey by deed to C. W. Welch, his home place of eighty acres. In the prayer to their complaint they ask that the deed from W. M. Welch to C. W. Welch be canceled, except as to the eighty acres described and known as the home place, and that the title to same be vested in them except the interest of C. W. Welch in the lands under the law of descents and distributions in this State. The evidence shows that W. M. Welch took a tax receipt



describing all his lands, 480 acres, to J. D. Block, an attorney, and asked him to prepare a deed to his son, C. W. Welch, to said lands, and that the attorney did so, and delivered the deed to W. M. Welch. About that time C. W. Welch came into Block's office. W. M. Welch then handed the deed to his son, C. W. Welch, and said: "Take it and go and record it." The theory of the plaintiffs is that the father only intended to convey to his son the home place comprising eighty acres. That he could not read nor write, and relied absolutely upon his son in preparing the description to the land. That W. M. Welch was laboring under the mistake that the tax receipt only contained a description of the home tract of eighty acres and did not know that it contained a description of all his lands, comprising 480 acres. That C. W. Welch, knowing these to be the facts, concealed the truth from his father in order to secure a conveyance of his father's lands, which he well knew his father never intended to convey to him. This would be a case of a mistake of one party accompanied by fraud or inequitable conduct of the other party, which is a good ground for reformation of a written instrument. It is not alone in cases of mistake that a court of equity will reform a written instrument. Under the head of Reformation and Re-execution of Instruments, Professor Pomeroy says: "This subject has already been treated under the head of 'Mistake' and little more need here be said. Equity has jurisdiction to reform written instruments in but two well defined cases: (1) Where there is a mutual mistake—that is, where there has been a meeting of minds—an agreement actually entered into, but the contract, deed, settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto; and (2) where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties. In such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of

the parties. The conditions of fact giving rise to the exercise of the jurisdiction to grant reformation are numerous. Almost all written instruments may be reformed when a proper occasion is furnished." Pomeroy's Equity Jurisprudence (3 ed.), vol. 4, par. 1376; and see, also, vol. 2, par. 870; 34 Cyc., pp. 920 and 921.

The following cases recognize the rule and grant or deny the relief according to the facts of each particular case: *Pyne v. Knight* (Iowa), 106 N. W. 505; *Williams v. Hamilton* (Iowa), 73 N. W. 1029; *Crookston Imp. Co. v. Marshall* (Minn.), 59 N. W. 294; *Dean v. Hall* (Ky.), 105 S. W. 98; *Gregory v. Copeland* (Ky.), 107 S. W. 768; *Taylor v. Deverell* (Kan.), 23 Pac. 628; *Koons v. Blanton* (Ind.), 27 N. E. 334; *Bergen v. Ebey*, 88 Ill. 269; *Kilmer v. Smith* (N. Y.), 33 Am. Rep. 613; *Sykes v. Life Ins. Co.* (N. C.), 61 S. E. 610; *Dannelly v. Cuthbert Oil Co.* (Ga.), 63 S. E. 257; *Venable v. Burton* (Ga.), 59 S. E. 253; *Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co.* (N. J.), 70 Atl. 380; *Chelsea Nat. Bank v. Smith* (N. J. Chy.), 69 Atl. 533; *Metcalf v. Putnam* (Mass.) 9 Allen 97; *Burchard v. Frazier*, 23 Mich. 224.

It is true some of the cases cited are cases of reformation for mutual mistake only, but others are cases where reformation was granted where there was a mistake on the part of one party, coupled with fraud on the part of the other. All of the cases cited recognize the rule announced by Professor Pomeroy as well established. See, also, *Martin v. Hempstead County Levee Dist. No. 1*, 98 Ark. 23. In *Cox v. Beard* (Kan.), 89 Pac. 671, it was said that the case came fairly within the well established rule that a deed is reformable, where, by the mistake of one party and the fraud of another, there is omitted from it land which it was stipulated should be conveyed, and numerous decisions are cited in support of the proposition.

In *Crookston Imp. Co. v. Marshall* (Minn.), 59 N. W. 294, there was conveyed more land than was intended, and the court held under the particular facts of that case

a reformation should be granted. The relief was granted in the application of the rule that the mistake of one party, accompanied by fraud or other inequitable conduct of the other party, may be good ground for the reformation of a written instrument, and Pomeroy's statement above copied was cited in support of the holding. The plaintiffs in this case are the children and heirs at law of W. M. Welch, deceased, and are entitled to only such rights as he was entitled to in his lifetime. It is admitted that the father intended to deed to his son the home place of eighty acres and that the deed to so much of the land should stand. While the relief prayed for is not called reformation, the facts bring it within that head of equitable relief.

(3) The next proposition of law to be considered is to determine the amount of proof required to afford relief in cases of this sort. In *Eureka Stone Co. v. Roach*, 120 Ark. 326, the court said: "It is the settled rule of this court that to justify or authorize the reformation of a written instrument on the ground of fraud or mistake, the evidence of such fraud or mistake must be clear, unequivocal and decisive."

In *Mitchell Manufacturing Co. v. Kempner*, 84 Ark. 349, the court said: "The written contract contained an express stipulation that the machines were 'not guaranteed against slugs, spurious coin or the weather,' and until it is established that this stipulation was inserted in the contract by fraud, accident or mutual mistake, it must be taken as a true expression of the agreement of the parties. The solemn written engagements of contracting parties can not be reformed except upon clear and satisfactory proof that the writing fails, by reason of fraud, accident or mutual mistake, in the preparation or execution thereof, to express the agreement intended to be entered into." *Martin v. Hempstead Co. Levee Dist. No. 1*, 98 Ark. 23.

It is objected that these cases can not be used as authorities to sustain the rule of evidence in cases of

mistake of one of the parties coupled with the fraud of the other, for the reason that the first case was a case of mutual mistake and that the cases cited to sustain the principles laid down in the latter case were cases of mutual mistake. This does not lessen their force as authority; for the court was speaking of the recognized grounds for reformation of written instruments and there would be just as much reason for the rule in one case as another.

In *Duecker v. Goeres*, 80 N. W. 91, the Supreme Court of Wisconsin said: "Testing the findings under consideration by the familiar rule that to warrant the reformation of a written instrument because of fraud upon the one side and mistake upon the other, or of mutual mistake, the facts in that regard must be made to appear by the most clear and satisfactory evidence, so as to leave no room for reasonable controversy on the subject, they can not be sustained."

In *Pyne v. Knight*, 106 N. W. 505, the Supreme Court of Iowa said that to justify reformation of a deed there must have been a mutual mistake or mistake on the part of one party, coupled with fraud on the part of the other; and the evidence showing this mistake must be clear, satisfactory and free from reasonable doubt."

In *Taylor v. Deverell*, 23 Pac. 628, the Supreme Court of Kansas recognized this as a familiar rule of evidence, saying: "It is true, as claimed, that to sustain a reformation of a deed, the testimony showing fraud should be clear and satisfactory to the court."

Professor Pomeroy says that parol evidence may be introduced in cases of reformation, especially where the ground of relief is fraud, and recognizes that the parol evidence must be most clear and convincing. Pomeroy's *Equity Jurisprudence* (3 ed.), vol. 2, par. 859, and vol. 6, par. 682.

In *Boyd v. Boyd*, 123 Ark. 134, it was held that evidence of declarations of a grantor, while of sound mind, prior to the execution of the deed, as to his intentions concerning the disposal of his property, was admissible on the question of fraud and undue influence in procuring

the execution of the deed. It is insisted that, by analogy, the same rule applies to the declarations of W. M. Welch and his wife after the execution and delivery of the deed in question to C. W. Welch, to the effect that he intended to divide his property among all his children. We do not think so. Such declarations would have a tendency to defeat the title he had conveyed to his son.

(4) In *King v. Slater*, 96 Ark. 589, and other decisions of this court, it has been held that the acts and declarations of a person in possession of a tract of land are admissible to show the character and extent of his possession, but not to contradict his deed to another. In that case we quoted with approval from *Prater v. Frazier*, 11 Ark. 249, as follows: "The declarations of a donor against the title of the donee, made in his absence, are not admissible in evidence to defeat the title of the latter." The declarations of W. M. Welch and his wife as to what disposition he intended to make of the lands in controversy were made after the execution and delivery of the deed to C. W. Welch and were made in the absence of the latter. Therefore, they are not admissible as evidence against the defendants in this case. Bearing these rules of law in mind, we now come to a consideration of the facts as disclosed by the record. While W. M. Welch could neither read nor write, and relied on his son, C. W. Welch, in the transaction of his business to a great extent, still the record shows that he was a man of strong mind and exercised a superintending control over his affairs. It is admitted that he intended to convey to his son the home place. He went to the office of Mr. Block with his tax receipt and asked him to prepare a deed to all the lands on it to his son. The deed contained the following: "This conveyance is made subject to the following conditions: That the parties of the first part are to have during the natural life of both of them the use, occupation and rents arising from all of said lands." The use of this language indicated that several tracts were embraced in the deed. Moreover, while it is true, Welch could neither read nor write, he was a man of strong intellect and one

who looked closely after his affairs and would likely have noticed that several tracts of land were contained in the deed. The fact that he could neither read nor write would not prevent him from recognizing descriptions of land when read to him. Opposed to this is the testimony that C. W. Welch recognized his father's right to control the land on several occasions after the execution of the deed. The fact that the land deeded to John Welch was embraced in the deed to C. W. Welch is a circumstance tending to show that the father did not intend to execute the deed to all the land described in the tax receipt. It may be, however, that the father overlooked this tract, and thought that all the lands in the tax receipt still belonged to him. These and other circumstances recited in the statement of facts (and which need not be repeated here), tend strongly to establish the contention of the plaintiffs. We do not deem it necessary to go into an extended discussion of the testimony. When the whole testimony is read and considered together, in the application of the rules of law above announced, we do not think that the plaintiffs have established their case with that clear, unequivocal and decisive evidence which would warrant this court in reversing the decree of the chancellor.

We need say but little here on that branch of the case pertaining to the claim of John Welch. The evidence shows that the father gave him this tract of land in 1874 and John Welch immediately went into possession of it, and has held adverse possession of it ever since. The deed to C. W. Welch was not executed until 1904. At that time John Welch had already obtained title to the land claimed by him by adverse possession.

It follows that the decree must be affirmed.

HUMPHREYS, J., dissents.

NIVEN *v.* ROAD IMPROVEMENT DISTRICT No. 14  
OF JEFFERSON COUNTY.

Opinion delivered February 4, 1918.

1. **STATUTES—ENACTMENT—CONSTITUTIONAL REQUIREMENTS—JOURNAL ENTRY.**—In order for the proper passage of an act by the Legislature, the Constitution requires not merely that the yeas and nays shall be taken on the final passage of the bill, but it is also required that the same shall be entered on the journal, thus making the journal entry the sole evidence of the proceedings.
2. **STATUTES—ENACTMENT—JOURNAL ENTRY—CONSTITUTIONAL REQUIREMENT—PROOF.**—The determination whether a legislative enactment was properly passed by a yeas and nays vote, as required by the Constitution, can be had only from the journal of each house itself.
3. **IMPROVEMENT DISTRICTS—VALIDITY—ACT NO. 116, ACTS OF 1917.**—Act No. 116, Acts of 1917, *held* not properly passed and to be invalid.

Appeal from Jefferson Chancery Court; *John M. Elliott*, Chancellor; reversed.

*Rowell & Alexander*, for appellant.

1. The act is void. The bill was not read for the third time and the vote was not taken by yeas and nays, nor entered of record in the journal. Only the journal as filed with the Secretary of State can be looked to. Const. Art. 5 § 21. 33 Ark. 17. The memoranda and minutes of the officers can not be considered but only the journal. 160 Ala. 181; 119 *Id.* 487; 76 Atl. 370; 90 Ark. 174.

*Caldwell & Triplett*, for appellees.

1. The Senate journal does not show the final passage of the act nor the yeas and nays vote. The provision of the Constitution is mandatory. 61 Ark. 226. The courts not only look to the journal but to the records of the Secretary of State. 72 Ark. 565; 83 *Id.* 448; 103 *Id.* 109; 108 *Id.* 184; 110 *Id.* 269. Also to the endorsements upon the original bill. 103 Ark. 109; 110 *Id.* 269. Where there is a variance between the journal and the manuscripts from which it is prepared, the manuscripts will prevail. 40 Ark. 200; 110 *Id.* 269. Courts will not

allow an act to fail because of mere clerical misprison. 34 Ark. 263; 40 *Id.* 200; 51 *Id.* 559; 103 *Id.* 109; 110 *Id.* 269; 104 *Id.* 16. They correct mere errors. 104 Ark. 16; 34 *Id.* 263-8.

The original manuscripts, minutes and endorsements constitute the real journal and these all show that the act was duly passed. It is on file in the office of the Secretary of State, duly signed and published. The act was duly passed and is valid. 34 Ark. 283; 110 *Id.* 269; 44 *Id.* 536; 32 *Id.* 414, 496; 86 *Id.* 69-75; 90 *Id.* 174; 40 *Id.* 200; 83 *Id.* 448; 72 *Id.* 563; 103 *Id.* 109; etc.

The manuscripts prevail over the journal where there is a variance.

McCULLOCH, C. J. In this case there is an attack upon the validity of an improvement district on the ground that the special statute creating the district\* was not enacted by the General Assembly in the manner prescribed by the Constitution, in that on the final passage of the bill in the Senate the vote was not taken by yeas and nays and the names of those voting for or against the measure entered on the journal.

The Constitution provides that "no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the persons voting for and against the same be entered on the journal, and a majority of each house be recorded thereon as voting in its favor. Art. V, Sec. 21. In another section of the same article (Sec. 11), it is provided that each house "shall keep a journal of its proceedings; and from time to time publish the same." It has been repeatedly decided by this court that the constitutional provision quoted above is mandatory and that the omission on the part of the law makers to comply with the same is fatal to the validity of a statute. *Vinsant v. Knox*, 27 Ark. 278; *Smithee v. Garth*, 33 Ark. 17. In *Smithee v. Garth*, *supra*, the court, in construing an identical provision of the Constitution of 1868, said: "But whatever may

\*Act 116, Vol. 1, p. 601 session Laws of 1917.—(Reporter).



have been the circumstances attending the supposed passage of the bill, it becomes our duty to hold the legislative department to a strict compliance with a mandatory provision of the Constitution, which in every case on the final passage of a bill, requires that the vote be taken by yeas and nays, and entered upon the journal. Manifestly the object of recording the yeas and nays is not to show that a quorum of the members of the House is present, or that a majority votes for the bill. The journal may show that there was a call of the House before the final vote on the passage of the bill was taken, and that a quorum was present, and indeed all the members present, and the journal may also state that a majority voted for the bill; yet if the yeas and nays be not entered on the journal, the requirement of the Constitution is not complied with, and the bill does not become a law. The Constitution says the yeas and nays shall be entered on the journal; and we have no right to say that this need not be done, or that half compliance is sufficient. It is not sufficient to enter the yeas and omit the nays, nor to enter the nays and omit the yeas, and in all cases the names of those voting in the affirmative and negative must necessarily be entered on the journal."

(1-2) It will be observed that the constitutional requirement is not merely that the yeas and nays shall be taken on the final passage of the bill, but it is also required that the same be "entered on the journal," thus making the journal entry the sole evidence of the proceedings. But the particular controversy in this case arises over the question as to what constitutes the journal, and whether the journal proper may be supplemented by other records in order to show that the yea and nay vote was taken on the final passage of the bill.

It appears from the testimony of the secretary of the Senate that written minutes or memoranda of the daily proceedings were taken by him and his assistants. The journal clerk also kept minutes from which the permanent journal was made up. The secretary himself

kept minutes of the votes by yeas and nays on the final passage of bills, and he kept this on the regular printed roll call slips containing the names of the members checked off so as to indicate the vote of each on the passage of the bill, and that when the vote was completed he handed this roll call list to the journal clerk who attached it to his minutes. The minutes of the journal clerk showed the vote on the final passage of the bill, and the yea and nay vote, but the minutes of the secretary of the Senate showed only that the bill had been passed, without giving the vote by yeas and nays. The minutes kept by the secretary of the Senate were filed with the Secretary of State and are on file there now, but they are not authenticated either by the certificate of the secretary of the Senate or the presiding officer. The minutes kept by the journal clerk have not been preserved. It is conceded that the journal book now on file with the Secretary of State does not show the final passage of this bill, but the witnesses testify that the daily minutes of the journal clerk from which the journals were finally made up did contain the printed slip showing the roll call on the vote on the final passage of this bill. The Secretary of the Senate testified that he also made up the manuscript for the printed journals, now in the hands of the printer, and that the final passage of the bill, and the record of the yea and nay vote thereon was shown. There is, therefore, no record in the office of the Secretary of State containing an entry of the yeas and nays on the final passage of this bill.

It is contended that the original minutes or memoranda kept by the journal clerk ought to be treated as a part of the journal which shows compliance with the statutory requirement, and that the loss of those minutes or the failure to preserve the same ought not to invalidate the statute. The framers of the Constitution requiring that each House of the General Assembly should keep a journal of its proceedings, used that term in its ordinary sense to mean a permanent record, which we

judicially know has been regularly complied with by each House in the past, and this being true, the daily minutes or memoranda are merely temporary and do not constitute a part of the permanent record designated as the journal. The argument might be sound if we were dealing merely with the question of evidence such as we had in the case of *Butler v. Kavanaugh*, 103 Ark. 109, and *Mechanics Building & Loan Assn. v. Coffman*, 110 Ark. 269, where we considered endorsements on the bills and other entries for the purpose of identifying the particular measure under consideration or the legislative steps that were being taken. In the *Coffman* case the question was whether those endorsements might be considered in determining whether the vote recorded on the journal was on the adoption of an amendment or on the final passage of the bill. Here we are not dealing with matters of evidence in identification of the proceedings, but we are to determine whether the plain provision of the Constitution has, according to the sole evidence authorized by the Constitution, been complied with, and in this matter we must follow as our guide the language of the Constitution, and it does not admit of a construction that the entry of the yea and nay vote anywhere except on the journal itself is sufficient. The daily minutes kept by the Secretary of the Senate or the journal clerk from which the permanent record is finally made up does not constitute a part of the journal within the meaning of the Constitution, and the entry there of the final vote is not sufficient. The statute provides that when the daily proceedings are made up in manuscript form and signed by the presiding officer, and attested by the secretary, they shall be filed in the office of the Secretary of State, in addition to the journal. Kirby's Digest, § 3738. That statute does not make the daily record a part of the journal. On the contrary, it presupposed that a permanent journal will also be kept and preserved in compliance with the requirement of the Constitution.

(3) It follows from what we have said that the statute creating the district was not legally passed, and that the proceedings thereunder are void. The decree is, therefore, reversed and the cause remanded with directions to enter decree in accordance with this opinion.

HUMPHREYS, J., not participating.

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ROWDEN v. FULTON COUNTY.

Opinion delivered February 4, 1918.

1. PUBLIC OFFICERS—SHERIFF—SALARY—FULTON COUNTY.—Section 2 of Act 296, Acts of 1911, providing for the salary of the sheriff of Fulton County provided that said salary “shall not exceed the sum of \$2,200 per annum. \* \* \*” *Held*, the statute meant that the sheriff shall receive an annual salary for the term of his office not exceeding \$2,200.
2. PUBLIC OFFICERS—SHERIFF—SALARY—FINAL SETTLEMENT—SUFFICIENCY OF FUNDS TO PAY SALARY.—Under Act 296, of the Acts of 1911, the sheriff of Fulton County was required to make annual settlement with the county court and to pay over to the county treasurer all funds in excess of his salary for the year, but *held*, these settlements were not final settlements as to the amount of his salary that might be due the sheriff on final settlement at the end of his term; at such final settlement it is the duty of the county court to determine whether the fees collected by the sheriff, and those uncollected but with which he was charged, and which it was his duty to collect during his entire term of office, have been sufficient to pay his salary during such term at the rate of \$2,200 per annum. If the fees do not equal the salary then he receives as salary all that he collected during the entire term, and if the fees are in excess of that sum, then such excess is due the county, and when paid should go into the general fund of the treasury.

Appeal from Fulton Circuit Court; *J. B. Baker*, Judge; reversed.

*C. E. Elmore*, for appellant.

Claim should have been allowed. Acts 1911, No. 296. 66 Ark. 30 is the law of this case and settles it.

*Kay & Northcutt*, for appellee.

66 Ark. 30 is not applicable. Here the act is different. It requires a settlement once a year at the July term. The appellant's excess of salary was properly covered into the treasury. Each year is separate to itself and an excess of salary paid at the end of one year can not be reclaimed to cover a deficit in salary in another year. Acts 1911, p. 808.

#### STATEMENT OF FACTS.

The appellant was elected sheriff and collector of Fulton County, and qualified and entered upon his duties October 30, 1914.

At the July term, 1917, of the county court appellant filed his claim for fees and commissions as follows:

"County of Fulton

*To Thad W. Rowden, Dr.*

To fees and commissions collected to July, 1915.....\$1,777.29

To fees and commissions collected from July,

1915, to July, 1916..... 1,984.78

To fees and commissions collected from July,

1916, to November 30, 1916..... 358.08

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\$4,120.15

#### Credits.

By amount allowed July, 1915.....\$1,466.64

By amount allowed July, 1916, (12

months salary) ..... 1,984.78

By amount allowed January, 1917,

(5 months salary)..... 358.08 \$3,809.40

Balance due the amount paid in July, 1915, in cash in excess of first 8 months salary.....\$310.65."

The claim was duly verified and submitted to the county court on the following agreed statement:

"Thad. W. Rowden was elected sheriff and collector of Fulton County, Arkansas, in September, 1914, and was qualified as such October 30, 1914. In the months of November and December, 1914, and January,

February, March, April, May and June, 1915, he collected fees and commissions that amounted to \$1,777.29.

"At the July term of the county court, 1915, he made a settlement. In the July settlement, 1915, after he had been in office eight months, he turned over \$310.65, this being the amount of fees and commissions that was collected in excess of eight months' salary.

"From July, 1915, to July, 1916, he collected in fees and commissions that amounted to \$1,984.78, which amount was \$215.22 less than the amount allowed the sheriff and collector for that year's work.

"From July, 1916, to November 30, 1916, he collected in fees and commissions, including claims allowed January, 1917, \$358.08, which amount was \$558.59 less than the amount allowed the sheriff and collector for five months' salary, that being the time he had served since the July settlement."

This claim was disallowed by the county court, and on appeal to the circuit court the judgment of the county court disallowing the claim was affirmed, and appellant duly prosecutes this appeal.

WOOD, J., (after stating the facts). Act 296 of the Acts of 1911 is an act entitled, "An act to amend Act No. 70 of the Acts of Arkansas for the year 1909, fixing the fees and salaries of the clerk, sheriff and assessor of Fulton County, Arkansas." The sections of the act affecting sheriffs are as follows:

"Sec. 2. The fees and salary of sheriff and ex-officio collector of said county shall not exceed the sum of twenty-two hundred (\$2,200) dollars per annum, and out of this sum he shall pay for all deputies and assistants; *provided*, he may be allowed, in addition to the above salary, seventy-five cents a day for feeding prisoners confined in the county jail of said county."

"Sec. 4. It shall be the duty of said sheriff \* \* \* to charge and collect the same fees as are now allowed by law, and he shall, on the first day of the regular July term of the county court of said county, file a sworn

statement in said county showing the amounts of all fees charged and collected by him, and shall make settlement with said court by paying all amounts in excess of the salary due him since the last settlement into the treasury, and file the treasurer's receipt therefor as a voucher in said settlement, and in said settlement he shall be chargeable and liable for all fees and commissions that it was his duty to charge and collect; *provided*, he shall receive such fees in addition to the fees allowed him by said act for collecting delinquent taxes as is now prescribed by law. No officer shall receive any pay from Fulton County in excess of the fees collected."

Section 5 provides, that "at each settlement made by any sheriff as aforesaid, he shall pay over to the treasurer of said county all funds received by him as such officer in excess of his salary, and take the treasurer's receipt therefor; *provided*, that such excess may be paid in Fulton County script, except such as has been charged to and paid by or that may be payable by said county to said officer."

"Sec. 6. Each officer shall keep a full and perfect record of all fees and commissions collected by him from any source whatever, and as such officer he shall enter the same upon said record, as soon as the services are rendered, showing the services rendered; the legal fees therefor, and the kind of money received or to be paid, which record shall, at all times, be open for inspection and a failure to comply with any of the provisions of this section shall be a malfeasance in office."

Section 7 provides, if he "shall fail or refuse to make settlement with the county court of said county, as required by this act, or to pay any and all funds into the treasury that it is his duty under this act to pay, unless for good cause such settlement be by the court continued, he shall be deemed guilty of a misdemeanor," etc.

Section 9 provides: "All money paid into the treasury of said county, arising from fees and commissions as aforesaid, shall be covered into the general revenue

funds of said county, and charged to the treasury by the clerk.”

(1) Article 7, section 46, of the Constitution fixes two years as the term of office of sheriffs and collectors. In naming the salary at an amount not exceeding the sum of \$2,200 per annum to be paid the sheriff and collector of Fulton County out of the fees collected by him the Legislature necessarily had in mind the term of his office as fixed by the Constitution, and in the absence of express language showing an intention upon the part of the Legislature to limit the amount of the salary so fixed for a period less than his term of office, the Legislature must be held to have intended that the salary named by them should continue during his entire term. The statute, therefore, should be interpreted as if the words “for the term of his office” were written into the second section *supra*, after the words “per annum.” For unless so construed the act would not conform to the Constitution. The term of office of the sheriff began October 30, when he qualified and entered upon his duties and continued thereafter for a period of two years. The words “per annum” were not intended to and did not have the effect of fixing or limiting the time to a period less than the full term during which the amount of the salary fixed in the act is to be paid. Section 2, therefore, means that the sheriff and collector shall receive an annual salary for the term of his office not exceeding \$2,200.

In *Independence County v. Young*, 66 Ark. 30, the court was called upon to construe a statute substantially similar to the one now under review, the only difference being that it was made the duty of the officer in that case to make quarter-annual settlements, whereas it is the duty of the officer, in the present case, to make annual settlements.

The statute under consideration was manifestly modeled after the Act of 1895, fixing the salaries of county



officers of Independence County. See Acts 1895, pages 66-69.

In *Independence County, v. Young, supra*, the petitioner prayed the county court to be allowed to retain as salary for the year all fees collected by him, instead of paying into the treasury the amount in excess of his salary for every quarter, as contemplated by the act of the Legislature of 1895. The transaction involved the fees collected by the officer for a period of only one year, and the settlement which he asked the court to approve as final was for a period of one year, beginning the first of November, 1895, and ending the 31st of October, 1896. In the present case the petitioner asked that he be allowed to retain as salary the excess of fees over salary due him as shown by his first July settlement with the county court and that such excess of fees be taken into consideration and that he be allowed credit for the same in subsequent settlements in order that he might retain all fees that had been collected by him, provided the sum total of fees thus collected did not exceed the amount of his salary at the rate of \$2,200 per annum, earned and due him at the time of his final settlement with the county court. In other words, appellant contends that he is entitled to a salary, under the act, of \$2,200 per annum to be paid out of the fees which he had collected and those uncollected, but with which he was charged and which it was his duty to collect; that when the settlement is had on this basis the county court would be due him the sum of \$310.65 which he had collected and paid into the treasury in excess of fees over salary during the first eight months of his incumbency, because since that time and during his whole term down to the final settlement with the county court he had not collected sufficient fees, including the sum above named, to pay the salary that was due him at the time of this settlement at the rate of \$2,200 per annum. The appellant is correct in his contention.

In *Independence County v. Young, supra*, we said: "The design of the Legislature, we think, was to fix the salary of the county clerk of Independence County at the sum of \$1,800 per annum, provided the fees and emoluments of the office for the year amounted to that sum. If the fees and commissions collected by or chargeable against the clerk during the year do not equal the sum of \$1,800, then the clerk gets as salary all he collects, but if the fees and commissions collected during the year, including the fees and commissions with which the clerk is chargeable, equal or exceed \$1,800, then the clerk receives that sum, and if there be an excess of that sum collected during the entire year, such excess at the end of the year, when the last or final settlement is made with the county court, is covered into the general revenue fund of the treasury. \* \* \* There is nothing in any section prescribing when the excess of fees over salary shall be covered into the revenue fund. The treasurer, therefore, when these quarter-annual settlements are made, shall receive whatever excess may be paid in at that time, and hold the same in the treasury; but the act of setting it apart to the general revenue fund does not take place until after the last and final settlement with the county court shall have been made; because prior to that time it can not be known whether the amount of fees collected and chargeable against the clerk for the entire year will exceed his salary for the year, and, unless they do, there would be nothing in the treasury to cover into the general revenue fund. If, at any quarter annual settlement, there shall have been paid into the treasury an excess over the salary due at that date, the treasurer simply holds the same in his official capacity until the final settlement of the officer is made. The treasurer holds such excess of any quarter annual settlement prior to the last for the party who shall be determined, in the final settlement of accounts between the county and officer, to be entitled thereto.

What we said in *Independence County v. Young, supra*, had reference, under the facts of that case, to a final settlement of the salary due the officer for a period of one year. But, under the facts of this record, the doctrine of that case is equally applicable to a final settlement for a period embracing the entire term of the officer. If, as we have already stated, it was the intention of the Legislature to fix the officer's salary at a sum not exceeding \$2,200 per annum for his entire term of office, then this case is concluded, by analogy in principle, by the construction given the similar statute in *Independence County v. Young, supra*.

(2) Under the statute, while the officer had to make annual settlements with the county court and pay over to the treasurer of the county all funds received by him in excess of his salary for the year, these settlements, under the doctrine of the above case, were not final settlements as to the amount of salary that might be due the officer on final settlement at the end of his term. At such final settlement it was the duty of the county court to determine whether the fees collected by the officer and those uncollected but with which he was charged, and which it was his duty to collect, during his entire term of office, had been sufficient to pay his salary during such term at the rate of \$2,200 per annum. If the fees did not equal the salary, then he received as salary all he collected during the entire term, and if the fees were in excess of that sum, then such excess was due the county, and when paid should be covered into the general revenue fund of the treasury.

It follows that the court erred in not allowing the appellant the amount claimed by him. The judgment is therefore reversed and the cause will be remanded with directions to the circuit court to enter its judgment in accordance with this opinion, and, when so entered, to certify such judgment to the county court to be entered as the judgment of that court.

SMITH, J., (dissenting). The act under consideration is Act No. 296, of the Special and Private Acts of the 1911 session of the General Assembly. It is found at page 808 of these acts. Its title is "An act to amend Act 70 of the Acts of Arkansas for the year 1909, fixing the fees and salaries of the clerk, sheriff and assessor of Fulton County, Arkansas." The relevant portions of the act are set out in the majority opinion.

It is apparent that this is a salary act, and Webster's New International Dictionary defines the word "salary" as follows: "The recompense or consideration paid, or stipulated to be paid, to a person at regular intervals for services; fixed regular wages, as by the year, quarter, or month; stipend." What salary is fixed by this act for the sheriff of Fulton County? And for what period of time is it fixed? Is the salary a monthly one, an annual one, or is it so much per term?

In answer to this question, it might be said that it is easily conceivable that a state of facts might be shown which would make plausible the argument that the entire act is unconstitutional and void, inasmuch as it abolishes a constitutional office by fixing the emoluments thereof at a sum so small that competent persons can not be secured to discharge the functions of that office. But the majority have given relief in another manner. They have placed upon the act the ameliorating wand of construction, and the most beneficent results appear. I shall not, therefore, discuss the merits of this act, but only its meaning. *Hic jacet et de mortuis nil nisi bonum!*

At the time of the passage of this act, the term of office of a sheriff commenced on the 31st of October, and of course expired on that date. Section 4 of the act requires the sheriff to make a settlement on the first day of the regular July term of the county court. In its wisdom, the Legislature saw fit not to make the official year of one's incumbency in office coincide with the fiscal year for which his settlements should be made. One year runs from October to October; the other year runs from July to

July. It is apparent, therefore, that the fees collected by a sheriff during one term of office would be accounted for, in whole or in part, in three separate settlements. There is no controversy about this construction of the act. Appellant made his settlements accordingly. The first report covered his fees and commissions from the time of his installation in office to the first regular July term of the court thereafter. And during this period he had collected \$1,777.29. This sum was \$310.65 in excess of the sum then due him, and he paid this excess into the county treasury. The agreed statement of facts so stipulates. His second report covered fees and commissions for one full year running from July, 1915, to July, 1916, during which time his collections amounted to \$1,984.78. The third report covered the fees and commissions for the remainder of the term from July, 1916, to its expiration, and amounted to \$358.08. During the period of time covered by the first report, there was an excess; during the periods of time covered by the two subsequent reports, there was a deficiency. The opinion of the majority allows the sheriff and collector to take this excess, which arose in one year, after having made a settlement and having paid over to the county treasurer the excess, and apply it to a deficiency in one or the other, or both, of the subsequent settlements which he made pursuant to the law.

As passed by the Legislature, this act provided that the fees and salary of the sheriff and collector shall not exceed the sum of \$2,200 *per annum*. It also provided that he should make a full report of all his fees charged and collected on the first day of the regular July term of the county court and, if there were an excess, to pay that excess into the county treasury; and if anything were necessary to give finality to this settlement, section 9 expressly provides that this excess "shall be covered into the general revenue funds of said county, and charged to the treasury by the clerk." Under the con-

struction of this act given by the majority, the collector must still make this settlement, but it loses all of its elements of finality. He makes the settlement, but he does so tentatively. He pays the money into the treasury, but he does so with the mental reservation that he may later take it out. Notwithstanding the provision of the act, that this excess shall be covered into the general revenue funds of the county, and charged to the treasury, it becomes necessary, under the majority opinion, to indulge the legal fiction that in some unknown way the treasurer will hold these funds until the end of the officer's term of office. This must be true, otherwise the official can not be paid the deficiency, for there is no provision in the act for the county to pay any part of these fees. The officer can not get them unless he collects them. It is expressly so provided. Yet, under the opinion of the majority, notwithstanding the provision, that these funds shall be covered into the general revenue funds of the county and charged to the treasury by the clerk, the fiction is to be indulged that they will not be used, but will remain therein subject to the possible future use of the sheriff to supply a deficiency existing in any of the periods of time covered by any one of his reports, during any one term of office.

The necessary effect and result of the construction of this act by the majority is to make it read that the sheriff shall receive, during his term of office, the sum of \$4,400 provided he collects it. It becomes immaterial, for all practical purposes, during which year he collects it, provided the collection is made during the term of office. The court has construed this act to mean that the salary shall be \$4,400 per term, and may be collected at any time during the term. The opinion of the majority also makes the fiscal year coincident with the official year, and it, therefore, becomes practically immaterial at which term of the court the settlement is made, because it remains provisional and tentative until the expiration of the term of office, at which time only can it

be known whether or not the sheriff will have collected a sum in excess of \$4,400.

The answers contained in the act to the following questions would appear to be decisive of the point at issue: Q. What is the purpose of the act? A. To fix the maximum salary of the sheriff and certain other officers of Fulton County. Q. At what sum is the sheriff's salary fixed? A. Not to exceed \$2,200. Q. For what time is it fixed? A. It is a salary *per annum*. Q. What special features does the act contain? A. "The design of the Legislature, we think, was to fix the salary of the sheriff of Fulton County (county clerk of Independence County) at the sum of \$2,200 (\$1,800) per annum, provided the fees and emoluments of the office for the year amounted to that sum. If the fees and commissions collected by or chargeable against the sheriff (clerk) during the year do not equal the sum of \$2,200 (\$1,800), then the sheriff (clerk) gets as salary all he collects, but if the fees and commissions collected during the year, including the fees and commissions with which the sheriff (clerk) is chargeable, equal or exceed \$2,200 (\$1,800), then the sheriff (clerk) receives that sum, and if there be an excess of that sum collected during the entire year, such excess at the end of the year, when the last or final settlement is made with the county court, is covered into the general revenue fund of the treasury. The title of the act shows its purpose to be 'to fix the fees and salaries of the county officers of Fulton (Independence) County.' We are of the opinion, taking the act as a whole, that the purpose, as we have indicated, was to fix the salary of the sheriff (county clerk) at the maximum limit of \$2,200 (\$1,800) per annum, to be paid out of the fees of the office collected and those not collected with which the sheriff (clerk) is chargeable during the year."

The language quoted is taken from the opinion in the case of *Independence County v. Young*, 66 Ark. 30, where an act of the General Assembly, fixing the fees

of the county clerk and certain other officers of Independence County, was under consideration, and, according to the briefs of counsel for appellant here, the act there construed served as a model for the act fixing the salary of the officers of Fulton County, and the majority opinion refers to it as a similar statute. The question there involved was whether the salary was per quarter or per annum. The question here is whether the salary is per annum or per term of office. In the former case the language quoted was construed to fix an annual salary, and I think the same language should receive the same construction in this case.

The act, as construed by the court, may be a more equitable one than the act passed by the Legislature, but it occurs to me that it is palpably a case of judicial legislation, and I, therefore, dissent.

The Chief Justice concurs in these views.

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CLARK v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN  
RAILWAY COMPANY.

Opinion delivered February 4, 1918.

1. **RAILROADS—DAMAGE BY FIRE—LIABILITY OF RAILROAD.**—Under Act 141, page 336, Acts of 1907, a railway company is liable absolutely in damages for injury to or the destruction of property, caused by such extraordinary hazards, as the operation of a locomotive engine, machinery, trains, cars, or other things, when used or operated upon the railroad, or by any of their servants or employees in the operation of such machinery upon the railroad tracks, or by the positive affirmative act of the servants or employees of railway companies in the operation of the railroad. The language of the act includes such acts as the burning off and clearing up of the right-of-way or roadbed, or such acts as the building of fires on the right-of-way, or in proximity thereto, while engaged in the work of repairing the railway track or roadbed for the operation of trains.
2. **RAILROADS—DAMAGE BY FIRE ON RIGHT-OF-WAY—LIABILITY.**—A railway company is not absolutely liable under Act 141, Acts of 1907, for the mere omission on the part of its servants or employees to extinguish or to prevent the spreading of fires on the right-of-way, which were started by others, or the origin of which is unknown.



3. **RAILROADS—LEASE OF RIGHT-OF-WAY.**—A temporary use of the right-of-way by permission of the railway company, which does not interfere with the public use of the railway right-of-way, and such use to end at the will of the railroad company, is not inconsistent with the franchise of the railway company.
4. **LEASE—TERMINATION—RAILWAY RIGHT-OF-WAY.**—A lease whereby a railway company granted the use of a portion of its right-of-way, *held*, not abandoned, under the testimony.
5. **RAILROADS—DAMAGE BY FIRE FROM RIGHT-OF-WAY—PROOF.**—In an action for damages by a fire communicated from defendant's right-of-way, testimony showing the existence of a fire near by off the right-of-way, and that a wind was blowing in the direction of appellant's property, is admissible. The railway is entitled to have all the testimony that would tend to shed light upon the probable origin of the fire go before the jury, whose sole province it was, under the circumstances, to determine that issue.

Appeal from Clark Circuit Court; *George R. Haynie*, Judge; affirmed.

*John H. Crawford* and *Dwight H. Crawford*, for appellant.

1. The railway company and receiver were liable, without proof of negligence, for damages by fire, whether it originated from the operation of trains, or was caused by servants in the line of their employment whether from acts of commission or omission. Acts 1907, p. 336; 120 Ark. 595, 600.

2. The court erred in not giving appellants' first instruction as requested and in inserting the word "negligently." 115 N. Y. 579, 5 L. R. A. 591; 112 Ark. 298, 300.

3. The court erred in refusing to give appellants' second instruction and in giving appellee's fourth and fifth cases *supra*.

4. It was error to permit Armstrong to testify about forest fires, etc., without connecting such fires with the origin of the fire destroying the property.

5. It was error to give the sixth instruction. It invited speculation as to whether or not some other cause for the fire existed, where there was no competent testi-

mony that furnished any other probable origin of the fire.

6. It was error to give instruction 8-A. Appellant can not be guilty of contributory negligence unless guilty of gross fraud.

7. Under Acts 1907, a plaintiff can not be guilty of contributory negligence, short of an act so grossly negligent as to amount to fraud. 121 Ark. 585-9; 105 *Id.* 374; 104 *Id.* 80-87-88; 112 *Id.* 298.

8. It was error to admit the lease in evidence. It had been abandoned and was not in force. The consolidated railway company only had a right-of-way of 99 feet and not 200 feet. 113 U. S. 465; 67 Ark. 498.

9. A railroad company can not lease a right-of-way for non-railroad purposes. 65 Wash. 100; 36 L. R. A. (N. S.) 522; 78 Tex. 71, 9 L. R. A. 295; 33 S. W. 139; 22 Kans. 285; 31 Am. Rep. 190; Mills on Em. Dom, § 57.

*E. B. Kinsworthy* and *R. E. Wiley*, for appellees. .

1. There was no proof of negligence. The fire was started by sparks from a smouldering fire not set by the railroad or its servants, and the appellees are not liable. Acts 1907; 336; 97 Ark. 287; 119 *Id.* 143. There is no error in the instructions given.

2. There was no error in No. 8-A, nor in No. 6.

3. Armstrong's testimony was competent. 121 Ark. 585.

4. There was no error in admitting the lease. It had not been abandoned, nor was it invalid. The lease was for a railroad purpose. 257 Ill. 491; 44 L. R. A. (N. S.) 1127; 77 Vt. 334; 70 L. R. A. 930; 20 *Id.* 647; 23 *Id.* 356; 17 Ill. App. 582; 36 L. R. A. (N. S.) 522.

5. If the lease was invalid appellant was a trespasser. 120 Ark. 595. The lease exempts defendants from liability. 120 Ark. 595; 44 L. R. A. (N. S.) 1127, and notes; 257 Ill. 491; 70 L. R. A. 930; 170 S. W. 591.

But if the lease was incompetent testimony it was not prejudicial; it is plain in its terms and confines the

absolute protection against liability to the property of the right-of-way.

The testimony was conflicting and the verdict, on proper instructions, is conclusive.

WOOD, J. Appellant instituted this suit against the appellees to recover for damages to his property, alleging, among other things, "that on September 21, 1916, the servants and employees of the defendants carelessly and negligently kindled a fire on the right-of-way of said railway company, and from said fire so carelessly and negligently kindled, the same was negligently allowed to spread and burn and totally consume plaintiff's said property; that if said fire did not spread from the right-of-way as above alleged, it was carelessly and negligently allowed to be kindled from sparks from one of defendant's trains operated on said railway."

The defendants denied the allegation of the complaint as to negligence and set up affirmatively the defense of contributory negligence, and also the provisions of a lease contract which the appellees alleged was a bar to appellant's cause of action.

I. There was testimony from which the jury might have found that appellant's mill was destroyed by fire which originated either from appellees' locomotive, or by fire which originated from some unknown cause, and was discovered by the section foreman on appellees' right-of-way near appellant's mill some three or four days before the mill was burned.

It could serve no useful purpose to set out in detail the testimony bearing upon the issue as to the origin of the fire, and also upon the issue as to whether or not appellees' servants were negligent in not putting out or controlling the fire after discovering the same, and also upon the issue as to whether or not the fire was caused by appellant's negligence. These were issues of fact for the jury.

The principal question to be determined on this appeal is whether or not, under the Act of April 2, 1907,

the appellees were liable to appellant in damages for the loss of his mill caused by fire which was known by the employees of appellees to exist on the right-of-way of the railway company some three or four days before the mill was destroyed, without other proof of negligence. The act, in substance, makes railway companies liable for the destruction of or injury to any property "which may be caused by fire or result from any locomotive, engine, machinery, train, car or other thing used upon said railroad, or in the operation thereof, or which may result from, or be caused by any employee, agent or servant of such corporation, company or person upon or in the operation of such railroad." And the owner of any such property may recover all such damages, and upon the trial of any suit for such damages "it shall not be lawful for the defendant in such suit or action to plead or prove as a defense thereto that the fire which caused such injury was not the result of negligence or carelessness upon the part of such defendant, its employees, agents or servants; but in all such actions, it shall only be necessary for the owner of such property so injured to prove that the fire which caused or resulted in the injury originated or was caused by the operation of such railroad, or resulted from the acts of the employees, agents or servants of such defendant." Act 141, Acts of 1907, p. 336.

(1) While the language of the act is somewhat involved and ambiguous, yet when construed as a whole, it shows that it was the intention of the Legislature to make the railway company liable absolutely in damages for injury to or destruction of property caused by such extraordinary hazards as the operation of a locomotive engine, machinery, trains, cars, or other things, when used or operated upon the railroad, or by any of their servants or employees in the operation of such machinery upon the railroad tracks, or by the positive affirmative act of the servants or employees of railway companies in the operation of the railroad. The language is

sufficiently broad to include such acts as the burning off and clearing up of the right-of-way or roadbed, or such acts as the building of fires on the right-of-way or in proximity thereto while engaged in the work of repairing the railway track or roadbed for the operation of trains.

Kansas has a statute to the effect that a fire caused by the operation of a railroad raises a *prima facie* presumption of negligence on the part of the railroad company. The Supreme Court of Kansas, in construing this statute, among other things, says:

"The statute prescribes a rule in actions for damages by fires caused by the operation of a railroad, and it is contended that caring for the right-of-way is not within the terms 'operating a railroad.' The claim is not tenable. The statute applies to all cases where the fire results from the operation of a railroad. It is not even confined to fire escaping from locomotives, but applies to all cases where the damage was caused by fire arising from any step in the operation of the road. The roadway and track of the company are as essential to the operation of the railroad as the locomotives or the other equipment." *Mo. Pac. Ry. Co. v. Merrill*, 40 Kan. 404, 407, 19 Pac. 793, 794.

And in *Mo. Pac. Ry. Co. v. Cady*, 24 Pac. 1088, the court says: "The burning of dry grass, weeds and other combustible material which annually accumulates on the right-of-way, is caring for the roadway and track."

(2) This is the utmost extent of liability which the Legislature intended to impose in the absence of negligence. There is no language in the act to justify the construction that it was the intention of the Legislature to make railway companies absolutely liable in damages for fires that were set out or started by others than the servants or employees of railway companies, or fires that were not shown to have been caused by the character of machinery mentioned or by some positive or affirmative act of the employees in originating the fire which caused the loss of or damage to property. In other

words, for the mere omission on the part of the servants and employees of railway companies to extinguish or to prevent the spreading of fires on their right-of-way which were started by others, or the origin of which is unknown, does not render railway companies absolutely liable in damages for the loss caused by such fires. For the destruction of, or injury to, property caused by such omissions on the part of the servants and employees of railway companies, such companies would be liable provided such omissions constituted negligence upon the part of such employees, but in that case the companies would be liable, not under the statute, but under their common law liability for injury and the consequent damage caused by their negligence.

In *Kansas City Sou. Ry. Co. v. Thomas*, 97 Ark. 287, a passenger placed his trunk in a railway station intending to take a train the next morning and the trunk was burned during the night. The origin of the fire was not shown. It was not proved that the employees of the railway company set fire to the station. In that case it was the contention of the appellee, Thomas, that the appellant company was liable absolutely under the Act of 1907, regardless of negligence. We held that the liability of the railway company, under the facts of that case, was not that of an insurer, but that its duty was that of a warehouseman, and its liability depended upon whether or not it had exercised ordinary care to preserve the property that had been entrusted to it. The exact question here presented was not before the court in that case, but the opinion is authority for holding that the act under review does not contemplate an absolute liability upon the part of railway companies for injuries by fires that are not caused in connection with the operation of their trains, and that are not shown to have been caused by some positive act of the servants or employees.

In *Kansas City So. Ry. Co. v. Wilson*, 119 Ark. 143, the damages for which appellee sued were caused by a fire shown to have been set out by appellant's section men

while burning off its right-of-way. In that case we said: "The liability of the defendant to the plaintiff for the destruction by fire of its pasture and fence depends, first, upon the proof whether it resulted from its act, and, second, whether the fire resulted from the negligence of the defendant or its servants in burning off its right-of-way. What would constitute such negligence or want of care and prudence as would render the railroad company liable for the destruction by fire from its act in burning off its right-of-way depends upon the circumstances as they existed at the time. \* \* \* It was the duty of the foreman to prevent the fire from escaping from the right-of-way of the railroad company. There was no other fire in the neighborhood and the jury might have inferred that the section foreman, after burning off the right-of-way, went off and negligently left fire burning there."

So, it will be observed that that case was disposed of on the theory that the evidence was sufficient to show that the employees of the appellant were negligent in going off and leaving a fire which they had set out to burn off the appellant's right-of-way. The question as to whether or not the appellant would have been absolutely liable under the facts of that case was not presented, and therefore we do not regard that case as decisive of the issue now before the court and as being in favor of the contention of the appellees. Nevertheless, in our opinion, the language of the statute compels the interpretation which we now give it.

We find no error, therefore, in the ruling of the court in refusing appellant's prayer for instructions which told the jury, in effect, that if the fire was set out by the appellees' locomotive engines, or in the operation thereof, or if there was a fire on the right-of-way which was negligently permitted by the appellees' servants and employees to spread and burn the appellant's property, that the appellees would be liable for the damages caused thereby.

II. There was no error in the giving of the appellees' prayer for instruction No. 8-A.\*

The defense of contributory negligence was set up in the answer, and there was evidence to warrant the court in submitting this issue to the jury, which was correctly done in prayer No. 8-A.

III. The court, over the objection of the appellant, permitted the appellees to introduce a lease contract with the appellant, by which the railway company agreed to allow the appellant to build a portion of his mill plant upon the appellees' right-of-way, and in consideration of the reduced rental which appellant was required to pay to the railway company appellant agreed to "waive, release, relinquish and abandon any and all claims or rights of action which he might otherwise have by reason of loss or damage to buildings or other property of the leased premises by fire, arising from the operation of the railway over and upon or near said premises, 'whether said fires be caused by sparks from locomotives or said lessor or in any other manner while this lease continues in force.' The contract contained a provision that 'the term shall commence on the day first above written and shall continue until thirty days after either said lessor, its successors or assigns, or said lessee shall serve written notice upon the other party of the desire to terminate this lease.' "

There was a further provision that the "lessee further agrees upon the termination of this lease to remove from the leased premises all buildings and other improvements erected by lessee thereon and to restore the sur-

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Instruction No. 8-A asked for by defendants.

"If you believe from the testimony that the plaintiff had an agent to look after the mill and that the agent knew of the fire burning near the mill and knew or by the use of ordinary care could have known that the same exposed the mill to destruction by fire and that he failed to use ordinary care to prevent the same, then your verdict should be for the defendants, notwithstanding you should find that the fire caught from a fire negligently or carelessly left by defendants' employees on the right-of-way, if you believe there was any such fire negligently left on the right-of-way." (Reporter.)



face of the ground to the same condition as before said buildings were erected and the improvements made.”

The undisputed evidence justifies the inference that this lease, on account of the low rental, was entered into on the part of the railway company in order to promote its business as a common carrier. There is no testimony to show that the use which the lessee made of the property could in any manner interfere with the duties which the carrier owed the public to transport freight and passengers.

“A railroad corporation holds its station, grounds, railroad tracks and right-of-way for the public use for which it is incorporated, yet as its private property; and to be occupied by itself or by others in the manner that it may consider best fitted to promote, or not interfere with, the public use. It may in its discretion permit them to be occupied by others with structures convenient for receiving and delivering freight upon its road, so long as a free and safe passage is left for the carriage of freight and passengers.” *Osgood v. Central Vermont R. Co.*, 77 Vt. 334, 70 L. R. A. 930.

(3) It is held by the authorities generally that a temporary use of the right-of-way by permission of a railroad company, not interfering with the public use of the right-of-way of a railroad, and to end at the will of the railroad company, is not inconsistent with the franchise of the public carrier. See *Griswold v. Ill. Cent. R. Co.*, 90 Iowa 265, 24 L. R. A. 647; *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 454.

(4) While there was testimony to the effect that the owner of the mill plant had abandoned, for some years, the manufacture of lumber, and also to the effect that the railway company had severed the switch connections with the mill plant, this testimony was not sufficient to show that the parties to the contract had abandoned the same. The contract itself prescribed the terms upon which the parties to it might terminate it; that is, by written notice served upon the opposite party thirty days before the termination of the contract. There is no evidence to show

that the contract was terminated in this manner. As the lease provided that when the same was terminated the lessee was to remove from the leased premises all the buildings and other improvements that had been erected thereon by him, and since these improvements had not been removed, the presumption would be that the lease contract had not been terminated or abandoned. The court was correct in treating the same as in existence, and in permitting the same to be read in evidence.

(5) IV. Witness Armstrong testified, over the objection of appellant, that he saw forest fires along through the woods about half a mile from where appellant's mill was located, and on the same side of the track that the switch and mill were on; that the woods were unbroken from where he saw the fires to the mill; that he passed there about 11:30 o'clock a. m. before the fire occurred. The fire occurred something after one o'clock in the afternoon. The fire was running along, burning the leaves and grass and stuff on the ground. Lots of tree tops were lying around there and the fires were burning up into them. There was heavy smoke all along through that part of the country, between Britts and the Little Missouri River. The river was south, towards Texarkana, from Britts.

Other witnesses testified that there was a high wind blowing from the direction where the fire was seen in the woods towards the mill plant. It was in the fall of the year and very dry.

This testimony was competent. It was a question for the jury to determine, from this evidence, in connection with the other evidence, as to the origin of the fire that caused the destruction of appellant's property. It cannot be said that this testimony was too remote to throw any light upon the origin of the fire. It cannot be said that it was physically impossible for the fire which Armstrong discovered in the woods to have been transmitted by the high winds through the combustible material

intervening to the mill plant of appellant. The appellees were entitled to have all the testimony that would tend to shed light upon the probable origin of the fire go before the jury, whose sole province it was, under the circumstances to determine that issue.

It follows, therefore, that the court did not err in granting the appellees' prayer for instruction No. 6,\* which was based upon the above testimony.

The record presents no reversible error and the judgment must therefore be affirmed.

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BURKE v. NEW ENGLAND NATIONAL BANK.

Opinion delivered January 14, 1918.

1. **FRAUDULENT CONVEYANCES—TO MEMBERS OF FAMILY.**—A voluntary conveyance of property by an embarrassed debtor, to members of his family, is fraudulent as to existing creditors.
2. **FRAUDULENT CONVEYANCES—INSOLVENT DEBTOR—GOOD FAITH.**—There is no rule of law contravening the right of an insolvent debtor to borrow money and pledge his property in good faith, for the purpose of paying his debts.
3. **INSOLVENCY—SUBSTITUTION OF ASSETS.**—The *bona fide* substitution of one asset for another equally valuable, by an insolvent debtor, can not prejudice a creditor.

Appeal from Sebastian Chancery Court, Fort Smith District; *W. A. Falconer*, Chancellor; reversed in part; affirmed in part.

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\*The court instructs you that if the evidence, in this case, fails to show how the fire started, or if from the evidence you believe that it is equally as probable that the fire started from some other cause as that it started from sparks or cinders from defendant's locomotives or from a fire on the right-of-way which was negligently permitted to spread by defendant's employees, then your verdict should be for the defendants. (Reporter.)

*Hill, Fitzhugh & Brizzolara and John H. Vaughan,*  
for appellants.

1. M. C. Burke was not insolvent at the time of the alleged transfer and there is no evidence of fraud, actual or constructive.

2. All the property transferred to the Union Realty Company, as well as other property held to be fraudulently conveyed was bought with the funds of Burke Bros.

3. Lot 3, block 45 Fitzgerald's Addition did not belong to M. C. Burke. But he was solvent at the time of the conveyance. It was bought with funds of Burke Bros. and really belonged to J. A. Burke. Burke Bros. were indebted to Mary Burke. There was no fraud on creditors. Lots 7 and 8, block 9, S. Fort Smith were worth little. They were also bought with funds of Burke Bros and the transfer to Helene Burke could not be fraudulent as to one half of the property. Burke was solvent at the time and there was no fraud nor intent to defraud creditors.

4. The assignment and transfer of the corporate stock was legal. There was a valuable consideration and no fraud. Burke was not insolvent, even if embarrassed. The transfers were pledges to secure valid debts.

5. Both the stock and land cannot be taken. The law as applied to the facts is stated in 73 Ark. 174; 86 *Id.* 225; 91 *Id.* 394; 108 *Id.* 164. Burke was solvent. An insolvent husband may prefer his wife's debt. 76 Ark. 254; 119 *Id.* 492. Mere inadequacy of price does not indicate fraud. 118 *Id.* 229. But here the consideration was adequate. Each pledge was for the actual amount of money advanced. There was no withdrawal of property from creditors, the money was used to pay creditors. 50 Ark. 314; 107 *Id.* 588. See also, 96 Ark. 531; 101 *Id.* 573.

*Kimpel & Daily,* for appellees.

1. The evidence supports the findings of the chancellor. All the facts and circumstances point to and show

that the conveyances and transfers were voluntary and fraudulent as to creditors. 68 Ark. 167; 73 *Id.* 174; 86 *Id.* 225; 106 *Id.* 252; 179 S. W. 329; 116 Ark. 686; 107 *Id.* 537; 110 *Id.* 335 and others. Burke was insolvent before any of these conveyances and transfers were made and the considerations were not valid.

2. The conveyance to his daughter Helene was voluntary and fraudulent. There is no evidence that J. A. Burke was interested in the lots or that it was purchased with funds of Burke Bros. Nor did Helene pay anything for the property.

3. The deed to Mary Burke was also void. She paid no consideration for the lot. It was a pure gift from an insolvent and void as to creditors.

4. The conveyance of the old opera house property and the transfer of 349 shares of stock by M. C. Burke to his wife and sister were void. No consideration was paid and the transfers fraudulent.

5. The conveyance of the opera house property to Union Realty Company was fraudulent and void. There was no consideration. The chancellor's findings are supported by the evidence.

6. The pledge of Burke's stock to members of his family and his various corporations were fraudulent and void. No satisfactory explanation of any of these transfers was made by Burke. All the facts and circumstances point to and indicate fraud. 110 Ark. 347.

HUMPHREYS, J. Appellees, judgment creditors of M. C. Burke, filed suit in the chancery court in the Ft. Smith district of Sebastian County, against appellants, to cancel as voluntary and fraudulent various conveyances of real estate and many assignments and pledges of stocks made by M. C. Burke to his co-appellants.

All the appellants answered denying that the conveyances of real estate and assignments and pledges of stocks were voluntary and fraudulent.

The causes were consolidated and heard upon the pleadings, oral and record evidence, and a decree rendered

canceling as voluntary and fraudulent the assignment of 349 shares of the corporate stock in the Union Trust & Realty Company to Alice and Mary Burke; the pledges of 50 shares of said stock to each of the following parties: Alice Burke, Mary Burke, A. J. Burke, Burke Brick Company and Union Trust & Realty Company; and the following conveyances of real estate: An undivided one-half interest in the west 67 feet of lot 4, south side of Garrison Avenue, and lot 10 in block 505 in the Reserve Addition, known as the Opera House property, to Union Trust & Realty Company; lot 3, block 45, in Fitzgerald's Addition to the city of Ft. Smith, to Mary Burke; and lots 7 and 8 in block 9, in South Ft. Smith, to Helene Burke.

From the decree canceling assignments and pledges of stocks and conveyances of real estate aforesaid, an appeal has been lodged in this court.

The record is so voluminous the court is impelled to confine itself to a general statement of the facts in substance only.

M. C. Burke was a wealthy business man and during his years of prosperity gave his wife and other relatives quite a little property. In the year 1905 he and his brother, A. J. Burke, conveyed real estate in the town of Cotter, Arkansas, to Alice, his wife, and Mary, their sister, of the value of \$5,000. Prior to any financial trouble, he erected buildings on that portion of the Cotter property conveyed to his wife, which enhanced its value from \$2,500 to \$12,500. Through such gifts, and judicious investments thereof, Alice Burke acquired a considerable separate estate of money, stocks and real estate, prior to the acquisition of the property subjected to the payment of her husband's debts by the decree in this case.

M. C. Burke was a man of large affairs, and, for the purpose of carrying on his business, incorporated the Burke Brick Company, Burke-Andrus Sand Company, Union Trust & Realty Company, and organized the partnership of Burke Bros., Burke & Josephs, Burke & Mc-Nerney and Burke Construction Company. The corpora-

tions engaged in business indicated by their respective names and the partnerships in the construction of municipal improvements, railroads and other contract work of like nature. While operating these corporations and firms, M. C. Burke and A. J. Burke acquired real estate of considerable value, which was paid for chiefly with partnership and joint corporate funds. The Union Trust & Realty Company was organized in the year 1910 initially as a holding corporation for the real estate of the Burke family, with an authorized capital stock of \$200,000, but only \$100,000 was treated as paid-up and subject to issue. The \$100,000 of stock was apportioned, 599 shares to M. C. Burke, 400 shares to A. J. Burke, and 1 share to their attorney, John Vaughan, for incorporation purposes. The stock was not actually issued and delivered, but was treated as apportioned and issued in the manner aforesaid until January, 1913. At the time the corporation was organized, it was understood that stock would be issued at a future date to each according to the value of the real estate conveyed to the corporation by each. The Burke family conveyed real estate to it when first organized as a basis for the stock issued for the expressed value in the deeds of about \$60,000. Some of it was more valuable than the expressed consideration; for example, Alice Burke conveyed lots in Cotter of the value of \$12,500 for an expressed consideration of only \$2,400. M. C. Burke and John Vaughan both testified that it was the intention of M. C. Burke and A. J. Burke to convey the opera house property to the Union Trust & Realty Company as a basis for the \$100,000 stock issue, but the minutes of the corporation show that the corporation refused to accept the property, and the reports of the officers, from time to time, prior to January, 1913, corroborate the books. Other property in addition to the opera house, owned by the Burkes, was not conveyed to the corporation.

Prior to the year 1912, M. C. Burke inaugurated the policy of borrowing from one corporation or firm to assist some other corporation or firm in which he was

interested. It became necessary to assist the firms of Burke & Josephs and Burke & McNerny, so M. C. Burke, without the knowledge or consent of his brother, withdrew \$65,000 from the firm of Burke Bros, for that purpose. On September 3, 1912, in order to indemnify his brother against loss on account of the withdrawal of funds from Burke Bros. in the past and future, he assigned his brother 600 shares of Burke Brick Company stock, 83 shares of Burke-Andrus Sand Company stock, and an undivided one-half interest in Burke-Andrus Sand Company, purchased from W. P. Andrus; an undivided one-half interest in all moneys and open accounts due Burke Bros., and all retained percentage on contract with Improvement District No. 5, City of Ft. Smith, and all moneys that might become due on final completion of their paving contract with the City of Ft. Smith; and his undivided one-half interest in machinery, the constructions, moneys, etc., in Burke-Cochran Construction Company of Lincoln, Nebraska, and in the Burke & McNerny contracts and outfits.

On January 1, 1913, the financial condition of M. C. Burke was about as follows: He owned 800 or 900 shares of Burke Brick Company stock, pledged to the Central National Bank of St. Louis and his brother for large amounts. This stock was later sold for a trifle. 123 shares of the stock of Burke-Andrus Sand Company, pledged to his brother to secure a large amount; 150 shares in a Texas land company, pledged to H. P. Hilliard of the Central National Bank; cash in banks, \$1,100; open accounts \$1,200; an undivided one-half interest in the opera house property upon which there was a \$20,000 mortgage; lot 3, block 45, Fitzgerald's Addition which he afterwards claimed belonged to his brother; and 599 shares of stock in the Union Trust & Realty Company, 24 shares of which rightfully belonged to Mary Burke, and 125 shares of which rightfully belonged to Alice Burke, under a former agreement to equitably divide the stock.



On the 29th day of January, 1913, M. C. Burke and A. J. Burke conveyed the opera house property to the Union Trust & Realty Company for the consideration of \$1. On the same day, he conveyed lot 3, block 45, Fitzgerald's Addition to the City of Ft. Smith, to Mary Burke for an expressed consideration of \$1,500, but no consideration was really paid. Lot 3, block 45 was purchased from Mary McKenzie, et al, in 1909. This lot was purchased along with lots 1 and 2 in the same block for the joint consideration of \$4,600, \$500 of which amount was paid by M. C. Burke and the balance by Burke Bros. Lots 1 and 2 were conveyed to A. J. Burke and lot 3 to M. C. Burke. Lot 4, 5 and 6 in the same block were purchased in 1908 from a different party for \$4,500 and conveyed to Alice Burke. On the same day, he assigned 250 shares of the corporate stock of the Union Trust & Realty Company to Alice Burke, his wife, 125 shares of which was a gift; and 99 shares to Mary Burke, his sister, 75 shares of which was a gift. Alice Burke had only conveyed real estate of the value of \$12,500 to the corporation and Mary Burke lands of the value of \$2,400.

In the execution of his designs to borrow money to tide his weak corporations over the chasm of financial distress, M. C. Burke pledged 50 shares of the corporate stock of the Union Trust & Realty Company on the 3rd day of January, 1913, to A. J. Burke, to secure borrowed money in the sum of \$5,700; 50 shares on the 16th day of January, 1913 to Alice Burke, to secure borrowed money in the sum of \$5,000; 50 shares on February 4, 1913, to Union Trust & Realty Company to secure borrowed money in the sum of \$5,200; 50 shares pledged on the 1st day of May, 1913, to Burke Brick Company to secure borrowed money in the sum of \$5,000; 50 shares pledged on the 30th day of May, 1913, to Mary Burke to secure borrowed money in the sum of \$3,000.

Checks were issued by the respective parties aforesaid to M. C. Burke for money borrowed by him, and he executed notes to each for the amounts borrowed and attached the stock certificates to each note.

The New England National Bank obtained its judgment on the 8th day of October, 1914, on an indebtedness for \$7,500, the major portion of which had existed since August 12, 1912. Leming Company obtained judgment on the 23d day of June, 1914, for \$1,272 on an indebtedness, a portion of which existed as far back as June 3rd, 1912. Jefferson Trust Company obtained judgment on the 23d day of June, 1914, for \$7,125 on an indebtedness created on or about the 13th day of May, 1914. Before executions were issued upon the judgments the transfers of the corporate stock aforesaid by M. C. Burke were deposited in the county clerk's office. The deed of the opera house property to the Union Trust & Realty Company was filed for record on the 23rd day of October, 1914. The deed for lot 3, block 45, Fitzgerald's Addition to Mary A. Burke was filed for record on February 26th, 1915. On the same date, a deed was placed of record from M. C. Burke to his daughter, Helene Burke, to lots 7 and 8, block 9, South Ft. Smith, Arkansas, which had been executed on January 23, 1914, for a consideration of \$200 and love and affection. The last mentioned property was purchased by M. C. Burke with private funds and conveyed to his daughter without consideration other than love and affection.

It is admitted by learned counsel for appellant that if M. C. Burke was insolvent at the time he made the transfers of stocks and real estate that they were void as to existing creditors, if made without fair consideration. The transfers challenged by the appellees and canceled by the court began in the month of January, 1913, and ended with the transfer of the South Ft. Smith lots to Helene Burke, January, 23, 1914. The conveyance of real estate, transfers and pledges of stock made by M. C. Burke to members of his family during the month of January, 1913, and thereafter, practically stripped him of all his material assets except equities which were of doubtful value. It is quite apparent from the record that M. C. Burke was on doubtful ground financially as far back as 1912. At that time he had been forced to draw as much as \$65,000 out of the copartnership assets of Burke Bros., to assist his weaker concerns which were in financial distress, and at

that early date had pledged nearly all his personal property to indemnify his brother against loss. The statement he introduced in evidence as to his financial condition on January 31, 1913, consisted in estimated equities in stocks which he had pledged for large amounts, either to banks, his own corporations or relatives. He was forced to allow these equities to sell at a later period for a mere trifle. By his own admission, he was cramped financially after November, 1913, and was insolvent when the judgments were obtained against him. Owing to the complex business relations of M. C. Burke, it is hard to determine the exact date he became insolvent, but, after a careful investigation of the record, we are convinced that, aside from the property he afterwards conveyed, assigned and pledged to his relatives and the Union Trust & Realty Company, he was insolvent as early as January 1, 1913. Having determined that M. C. Burke was an embarrassed debtor in January, 1913, and it appearing that all of the conveyances canceled by the trial court were made to Burke's own corporations or near relatives, the main issue is thereby narrowed to the sole question of whether the conveyances were without consideration. The rule in this character of case, as applied to voluntary conveyances, has been clearly stated and is as follows:

(1) "Conveyances made to members of the household and near relatives of any embarrassed debtor, are looked upon with suspicion and scrutinized with care, and, when they are voluntary, they are *prima facie* fraudulent, and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors." *Wilks v. Vaughan*, 73 Ark. 174; *McConnell v. Hopkins*, 86 Ark. 225; *Morgan v. Kendrick*, 91 Ark. 394-399; *Simon v. Reynolds-Davis Grocery Co.*, 108 Ark. 164.

The conveyance of an undivided one-half interest in the opera house property to the Union Trust & Realty Company was for an expressed consideration of \$1 and therefore voluntary, unless in equity it should be treated as conveyed to the holding corporation when the Burkes

conveyed the other property to it. If so treated, a part of the stock apportioned to the Burkes would constitute the consideration for the property and the conveyance would not be voluntary. It is insisted that the value of the property actually conveyed to the corporation did not warrant an issue of \$100,000 in stock and that, therefore, the opera house property was necessarily the basis of the \$100,000 stock issue. This contention is not conclusive for it is not an uncommon thing to over-value real estate when made the basis of a stock issue, even though contrary to the Constitution of Arkansas. Again, it may be that the real estate actually conveyed to the corporation was of the value of \$100,000, for it is in evidence that the Cotter property conveyed to the corporation by Mrs. Alice Burke was conveyed on the basis of the value of the land, exclusive of improvements. That particular land was worth only \$2,400 and the improvements \$10,000. The property, including the improvements, passed to the corporation by the deed. This tract of land would warrant an issue of \$12,500 in stock, when if the expressed consideration in the deed were the criterion, this tract would warrant an issue of only \$2,400 in stock. The record is silent as to improvements on the other tracts conveyed to the corporation. The records of the corporation show that the corporation refused to accept the opera house property by resolution. Immediately after refusing to accept the property, \$100,000 of stock was treated as issued and apportioned. According to the report of the officers a year later, the opera house property was not included as a part of the real estate belonging to the corporation. It is also in evidence that immediately after the corporation refused to receive the opera house property from M. C. Burke that M. C. Burke deeded an undivided one-half interest therein to his brother, A. J. Burke. The explanation tendered, that the failure to deed the property to the corporation was an oversight, is neither reasonable nor satisfactory. The chancellor correctly held the conveyance of date January 29, 1913, of

the opera house property to the Union Trust & Realty Company for \$1, a voluntary conveyance and void.

The conveyance of lots 7 and 8, block 9, in South Fort Smith, by M. C. Burke to Helene Burke, his daughter, was without consideration and made at a time when M. C. Burke was insolvent, and the finding of the chancellor to the effect that it was voluntary and void is approved.

It is insisted that the court erred in holding the conveyance of lot 3, block 45, in Fitzgerald's addition, to Mary Burke, a voluntary conveyance by M. C. Burke, for the reason, it is said, that the lot was the property of A. J. Burke, and not M. C. Burke's. This lot was purchased along with lots 1 and 2 in the same block for a total consideration of \$4,600. Burke Bros. paid \$4,100 of the purchase money and M. C. Burke \$500 thereof. Lots 1 and 2 were deeded to A. J. Burke and lot 3 to M. C. Burke by the same grantors at the same time. Lot 3 was valued in the deed at \$1,500, so the division made at the time between M. C. Burke and A. J. Burke was most favorable to A. J. Burke. It is said, however, that because lots 4, 5 and 6 in the same block were purchased with Burke Bros.' money and conveyed to Alice Burke, that lots 1, 2 and 3 equitably belonged to A. J. Burke. Lots 4, 5 and 6 were purchased from a different party a year before lots 1, 2 and 3 were purchased. These were entirely different transactions, and, as far as the record reflects, no connection existed between the two purchases. The explanation offered that this lot belonged to A. J. Burke, and not M. C. Burke, is unreasonable in the light of the testimony in this case. The chancellor was correct in holding that the conveyance was voluntary and void.

It is insisted by appellant that the chancellor erred in finding that the assignment of 250 shares of stock in the Union Trust & Realty Company to Alice Burke was voluntary and void. We think it clearly established by the evidence that Alice Burke conveyed separate real estate to the holding corporation of the value of \$12,500 with the understanding that she should receive therefor stock

of the corporation in equal amount. It is equally as clear that M. C. Burke not only assigned \$12,500 of said stock to her but that he made her a present of an additional \$12,500 of said stock. The chancellor was correct in finding the assignment of 125 shares of said stock voluntary and void, but was in error in so holding as to the other 125 shares assigned.

A like error was committed as to twenty-four shares assigned to Mary Burke, but the chancellor was correct in holding that seventy-five shares assigned to Mary Burke was voluntary and void. Mary Burke had conveyed real estate to the corporation of the value of \$2,400 and was entitled to that amount in stock under the general agreement entered into when the holding corporation was organized.

(2-3) Again, it is contended that the chancellor erred in holding the pledges of stock in the total amount of 250 shares to A. J. Burke, Alice Burke, Mary Burke, Burke Brick Company and Union Trust & Realty Company, for borrowed money, voluntary and void. We think it clearly established by the evidence that M. C. Burke borrowed the money in these several instances for the purpose of paying his creditors and that he paid the money to his creditors. It was in keeping with his plan and practice. Notwithstanding his extended financial entanglement, he had faith and hope in his ability to extricate himself from his dilemma. There is no rule of law contravening the right of an insolvent debtor to borrow and pledge his property in good faith for the purpose of paying his debts. The stock pledged by M. C. Burke was not withdrawn from the reach of his creditors. The money obtained on it was applied to the payment of his debts and his creditors still have the right to subject his equities in the stock to the payment of their judgments. The *bona fide* substitution of one asset for another equally valuable by an insolvent debtor can not prejudice a creditor. We think a clear preponderance of the evidence reflects the fact that M. C. Burke borrowed the amount of

money claimed, from each of the parties for the purpose of paying his creditors, and that he pledged the stock in good faith to secure the loans. The chancellor was in error in holding otherwise.

Lastly, it is contended that the creditors can not subject both stock in the Union Trust & Realty Company and the interest of M. C. Burke in the opera house property, which it is contended constituted a basis for the \$100,000 issue of stock in that corporation. Their contention would be correct if the opera house property constituted the basis for the stock issue, but we have held otherwise.

The decree is affirmed in directing a cancellation of the deeds conveying the opera house property, lot 3, block 45, Fitzgerald's addition, lots 7 and 8, block 9 south, Fort Smith; and the assignment of 125 shares of stock in the Union Trust & Realty Company to Alice Burke, and seventy-five shares thereof to Mary Burke—but is reversed in directing a cancellation of an additional 125 shares of stock in the Union Trust & Realty Company to Alice Burke and twenty-four shares thereof to Mary Burke, and in directing a cancellation of the pledges of stock to A. J. Burke, Alice Burke, Mary Burke, Union Trust & Realty Company and Burke Brick Company for borrowed money, and the cause is remanded with directions to enter decree in accordance with this opinion.

HUMPHREYS, J., (on rehearing). It is insisted on motion for rehearing that the division of the stock in the Union Trust & Realty Company, made on January 29, 1913, is the criterion by which the real interest of M. C. Burke and A. J. Burke in the stock should be ascertained.

The court did not treat the final stock issue of stock in the Union Trust & Realty Company, on January 29, 1913, of 250 shares of stock, each, to M. C. Burke, A. J. Burke, Alice Burke and Mary Burke, as representing a correct division or apportionment between them according to the original understanding that each should receive stock in proportion to the value of the lands conveyed by each to the holding corporation. On the contrary, the

court treated M. C. Burke as the owner of 599 shares of stock in said corporation, and A. J. Burke as the owner of 400 shares therein, subject, of course, to the equitable right of Alice and Mary Burke to have an amount equal to the value of lands conveyed by each to the corporation. The value of the lands conveyed by Alice was \$12,500, and by Mary, \$2,400. Alice was entitled to 125 shares and Mary twenty-four shares. M. C. Burke disposed of all his stock by gift or assignment. He does not claim to be the owner of any stock clear of encumbrance at this time. The following disposition was made of the 599 shares owned by him:

Two hundred and fifty shares assigned as collateral security; 125 shares assigned to Alice Burke in exchange for real estate; 125 shares assigned to Alice Burke by way of gift; 24 shares assigned to Mary Burke in exchange for real estate; 75 shares assigned to Alice Burke by way of gift. It is quite clear that this disposition was made of the 599 shares from the fact that A. J. Burke had 400 shares in the beginning, and now claims only 250 shares. It follows that he only gave Mary Burke 150 shares of his stock.

The mere fact that all the real estate was originally bought with partnership money is not conclusive that M. C. and A. J. Burke owned the lands equally when they were conveyed to the holding corporation. M. C. Burke conveyed much more land to the corporation than A. J. Burke. The fact that the stock was issued to them in unequal proportion indicates that they were not equal partners in all the land. They acted upon the original division made by them too long, and under the solemnity of an oath too often, to now say that a portion of the M. C. Burke stock belonged to A. J. Burke.

The court held that the opera house property was not rightfully conveyed to the Union Trust & Realty Company and that it never constituted the basis of a stock issue or added value to the stock. The original property conveyed by the parties constituted the basis and gave value to the \$100,000 stock issue.



Upon further examination of the transcript, it is found that the property conveyed to the holding corporation by Mary Burke was valued at \$2,500, instead of \$2,400, as found in the original opinion.

The original opinion is therefore modified so as to cancel seventy-four shares of the Mary Burke stock, instead of seventy-five shares.

In other particulars the motion for rehearing is overruled.

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BRYEANS, ADMX., v. CHICAGO MILL & LUMBER Co.

Opinion delivered January 21, 1918.

1. **MASTER AND SERVANT—DEATH—ACT OF EMPLOYEE—SCOPE OF EMPLOYMENT.**—Plaintiff's husband was shot and killed by the foreman of defendant's box factory, and plaintiff brought an action for damages against the defendant therefor. *Held*, under the testimony it was a question for the jury whether, in committing the act, the foreman was acting within the scope of his employment.
2. **MASTER AND SERVANT—KILLING—LIABILITY FOR ACT OF SERVANT.**—Defendant's servant was charged with the duty of keeping third persons from talking to other of defendant's employees. The said servant reprimanded deceased for talking with such employees, and after a quarrel the servant shot and killed deceased. Deceased's widow brought an action against defendant company for damages. *Held*, defendant's servant would be held to have acted within the scope of his employment if the killing grew out of a quarrel which arose when the servant told deceased to quit bothering the men, and the quarrel was continuous to the time of the killing; but it would be otherwise if the quarrel thus started had ceased for an appreciable interval.

Appeal from Crittenden Circuit Court; *R. H. Dudley*, Judge; reversed.

*J. T. Coston*, for appellant.

It was error to direct a verdict for appellee. The master was clearly liable as Breysacre was acting within the scope of his authority. The case should have been submitted to a jury. 42 Ark. 553; 58 *Id.* 386; 131 S. W. 971; 88 *Id.* 582; 6 Labatt, Master & S., § 2348; 93 S. W.

600; 52 *Id.* 834; 18 So. 923; 122 N. W. 486; 58 S. E. 609. The whole transaction was one and the same.

*Coleman, Lewis & Cunningham*, for appellee.

The court properly directed a verdict. The killing was not done within the scope of Breysacre's authority nor in furtherance of the master's business. It was a personal quarrel and encounter and Breysacher acted in self-defense. *Labatt on Master & Servant*, § 2288; 93 Ark. 403; 77 *Id.* 608; 115 *Id.* 288; 84 *Id.* 193; 32 Fed. 838; 143 N. C. 176; *Labatt, M. & S.*, § § 2276-2286; 69 Md. 257; 81 Ga. 485; 106 Ark. 115.

#### STATEMENT OF FACTS.

Appellant sued the appellee for damages alleged to have accrued to her by reason of the killing of her husband by one J. A. Breysacre, who, at the time of the killing, was in the employ of the appellee as superintendent of its box factory. The appellant alleged in her complaint that one of the rules of the company forbade "wood haulers and others to converse with, disturb or in any manner interfere with the laborers" employed by the appellee, and likewise forbade the laborers to converse with wood haulers or others who were not in the employ of the appellee; that it was the duty of the superintendent Breysacre to enforce this rule, and that while acting within the scope of his employment for the purpose of enforcing this rule he killed John Bryeans, the husband of the appellant.

Appellee denied that it had such a rule, and denied that Breysacre was acting within the scope of his employment when he killed Bryeans, and alleged that Breysacre killed Bryeans in a purely personal encounter, for which appellee was in no manner responsible.

Giving the testimony its strongest probative value in favor of the appellant, the facts are substantially as follows:

Lange had general supervision and control over all the employees. Shatz was next in authority, and Brey-

sacre was next in authority to Shatz, and was the foreman and superintendent of appellee's box factory.

There was a rule of the company requiring the foreman or superintendent to look after his department and keep people from bothering the men while at work. The assistant superintendent was asked the following question: "Well, was Mr. Breysacre within his line of duty or not in telling Mr. Bryeans he would have to quit bothering the men in the factory—talking to them?" and answered, "Yes, sir."

Bryeans was authorized to haul kindling from appellee's box factory, and he was in front of the kindling platform when the killing took place. He had been authorized to haul, and had been hauling kindling from appellee's plant for several years. He had driven his wagon to the platform and was lifting it in position to dump the kindling into it, when Breysacre said to him, "John, you will have to quit giving orders to that negro up there." The negro, at that time, was on the kindling platform in the act of dumping a load of kindling into the wagon. Bryeans said that "he had not been giving any orders to the negro." Breysacre replied, "Yes, you have; furthermore, you have been bothering the men in the shop. Every time you go by you bother Skinny Morgan, you stop and talk to him." Bryeans said he had not been bothering Skinny Morgan, and Breysacre again affirmed that he had. The two men by this time had become excited. When the dispute between them first started Bryeans had his gloves on and a smile on his face. After it had progressed some little time Bryeans seemed to be angry and the smile went off. He took his gloves off and laid them on the back end of the wagon and stepped away from the wagon. His face was flushed with anger. He ran his hands in his pockets and confronted Breysacre. The argument was then growing more heated all the time and Shatz got in between them. At that time they were close enough together for Shatz to put his hands on each of them and push them back. When Shatz thus separated them he said to Bryeans, "There was not any use in get-

ting into any heated argument about the thing; that whatever Mr. Breysacre had told him he would have to abide by that." They stopped talking and Shatz backed away from them, thinking it was all over with. Just a second or so after Shatz stepped away from between them they started to talking again in a low voice, and finally Bryeans told Breysacre, in a loud and heated way, that he would have to see Mr. Lange about it, and they apparently got mad all over again. Breysacre said that Lange did not have anything to do with it. Bryeans then called Breysacre a G—— d—— liar and started towards him and pulled his knife out of his right hand pants' pocket. Breysacre called Bryeans a G—— d—— liar and the next thing was the shot, when Bryeans threw up his hands, placing them on his face over the place where the bullet struck, and turned to Shatz and said, "He has killed me." The whole thing happened quickly, and Bryeans died in a very short time.

There was some conflict in the testimony as to the exact attitude Bryeans was in at the time the pistol was fired, whether he had his hands in his pockets or down by his sides, but this testimony is not material to the issue here.

The court instructed the jury to return a verdict in favor of the appellee, which was done, and from a judgment in favor of the appellee against the appellant for costs and dismissing appellant's cause of action this appeal has been duly prosecuted.

WOOD, J., (after stating the facts). (1) Whether or not Breysacre, at the time he killed Bryeans, was acting within the scope of his employment was an issue, under the evidence, for the jury to determine. While the evidence is undisputed, it can not be said that all reasonable minds would draw the same conclusion from it.

Giving the evidence its strongest probative value in favor of the appellant, which we must do in testing the ruling of the court directing a verdict against her, there was evidence to warrant the conclusion that Breysacre

was acting within the line of his duty when he told Bryeans that he would have to quit giving orders to the negro up there, and when he told him that he had been bothering the men in the shop; that this led to a controversy between Breysacre and Bryeans which resulted in the killing. In a word, there was testimony from which the jury might have found that Breysacre killed Bryeans while he was endeavoring to enforce the rule of the appellee requiring him to look after his department and to keep people "from bothering the men, the employees, while they were at work."

The undisputed testimony shows that the act of Breysacre in telling Bryeans that he would have to quit bothering the men in the factory caused a dispute and angry words to pass between them, whereupon the assistant superintendent interposed, separated them and they quieted down in their talk, in fact stopped talking, and Shatz backed away from them, thinking it was all over. But in a second or two they started up the argument again, first talking in a low voice, then becoming more excited, and finally Bryeans told Breysacre that he would have to see Mr. Lange about it. Then Breysacre told Bryeans that Lange did not have anything to do with it, whereupon Bryeans called Breysacre a G—— d—— liar, and he replied in kind; then the shooting took place.

Viewing the evidence in its strongest light in favor of the appellant, the jury would have been warranted in finding from this testimony that the killing was but the climax of the quarrel between Breysacre and Bryeans, which, although interrupted for a second or two, was in fact but one continuous quarrel caused by the act of Breysacre in reprimanding Bryeans, which act was in the line of Breysacre's duty. On the other hand, the jury would also have been warranted in finding from the evidence that, although the quarrel was started by Breysacre while in the line of his duty, yet the quarrel was stopped by the assistant superintendent, and, in a second or two thereafter the quarrel was started or renewed by Bryeans telling Breysacre that he would have to see Mr.

Lange about it, and upon Breysacre's reply that Lange did not have anything to do with it, calling Breysacre a G—— d—— liar.

These different views which reasonable minds might have drawn from the evidence made the issue as to whether or not Breysacre was acting within the line of his duty when he fired the fatal shot one of fact to be determined by the jury, and not one of law to be decided by the court.

(2) If the quarrel which was started by Breysacre in telling Bryeans that he would have to stop bothering the men in the shop was continuous to the time of the killing, and the killing grew out of such quarrel, then Breysacre at the time of the killing was acting in the scope of his employment. But if the quarrel which was thus started had ceased for an appreciable interval, however short, and was then renewed through the fault of Bryeans and the killing was the result of the quarrel thus renewed by Bryeans, then Breysacre at the time of the killing was not acting within the scope of his authority. See 6 Labatt, Master & Servant, and cases cited. The effect of the instruction of the court was to hold as matter of law that the quarrel was not continuous, and that Bryeans instigated and renewed the quarrel that had ceased.

Moreover, although Shatz testified that Breysacre was acting within the line of his duty when he told Bryeans that he must "stop giving orders to that negro," and stop talking to the men, bothering them while they were at work in the shop, he also testified that Bryeans denied the charge. This made it a question for the jury as to whether Breysacre was endeavoring in good faith to enforce the rule of the appellee, or whether he had turned aside from his duty and the service of the appellee to serve his own individual ends by engaging in a mere personal controversy with Bryeans. If the latter was his purpose, then of course the appellee was not liable. Therefore, as we view the evidence, the issue as to whether Breysacre was acting in the scope of his authority, at the time he killed Bryeans, was, as stated in the

beginning, one of fact to be submitted to the jury under appropriate instructions.

In one of the latest cases upon this subject we said: "No hard and fast rule has been or can be prescribed by which to determine what acts are within the scope of a servant's employment. Each case is governed by its own particular facts, under certain general rules of law. Cooley says: 'Where a servant acts without reference to the service for which he is employed, and not for the purpose of performing the work of the employer, but to effect some independent purpose of his own, the master is not responsible for either the acts or omissions of the servant.'" Cooley on Torts, 1032; 26 Cyc. 1536. Conversely, when the servant acts with reference to the services for which he is employed and for the purpose of performing the work of his employer, and not for any independent purpose of his own, but purely for the benefit of his master, it is generally held, under such circumstances, that the acts so done are within the scope of the servant's employment.

In the case of *Sweeden v. Atkinson Improvement Co.*, 93 Ark. 397, 402, we said: "The act of the servant for which the master is liable must pertain to something that is incident to the employment for which he is hired, and which it is his duty to perform, or be for the benefit of the master. It is therefore necessary to see in each particular case what was the object, purpose and end of the employment and what was the object and purpose of the servant in doing the act complained of."

In *St. L., I. M. & S. Ry. Co. v. Grant*, 75 Ark. 579, we said: "It is well established that a principal is liable for all torts, negligence, or other malfeasance committed by his agent in the course of his employment, and for the principal's benefit, although such torts or negligence are not authorized or ratified by the principal, or even though he had forbidden or disapproved of them, and the agent disobeyed or deviated from his instructions in committing them. If, from a consideration of all the facts and cir-

cumstances of the case, it is determined that the agent was acting for his principal, and in pursuance of his real or apparent agency, at the time the tort was committed, then it may be said that he was acting in the course of his employment, and the principal will be liable for such tort, whether authorized or not."

It is believed that these general principles of law, announced by this court, which are in conformity with the authorities generally, will enable the court to formulate a correct charge in submitting to the jury the issue as to whether Breysacre, at the time of the killing, was acting within the scope of his employment.

The issue as to whether Breysacre was justified or excused in committing the homicide in so far as that issue concerns the appellee is not presented by this appeal.

For the error indicated the judgment is reversed, and the cause is remanded for a new trial.

HART and SMITH, JJ., dissent.

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MAGALE v. FOMBY.

Opinion delivered February 4, 1918.

1. **BANKS AND BANKING—IMPROPER CONDUCT OF DIRECTORS—RELIEF—EQUITY JURISDICTION.**—Independently of statute equity has jurisdiction in an action involving the negligence of directors in the discharge of their duties, to afford redress to the corporation and in proper cases to its shareholders.
2. **BANKS AND BANKING—MISCONDUCT OF DIRECTORS—ACTION TO RECOVER LOSSES BROUGHT IN WHOSE NAME.**—Actions to recover losses caused by the mismanagement of a bank by the directors should be brought, in general, in the name of the corporation, but if it refuses to prosecute the action the stockholders, who are the real parties in interest, will be permitted to sue in their own names.
3. **BANKS AND BANKING—MISCONDUCT OF DIRECTORS.**—The directors of a bank loaned to a canning factory a large sum of money without requiring the borrower to give any security. The borrower was dependent upon its profits to repay the loan, and it was continually operated at a loss; *held*, the directors were guilty of negligence in the management of the bank.
4. **BANKS AND BANKING—MISCONDUCT OF DIRECTORS—LIMITATIONS.**—Directors of banks are not trustees of an express trust, within the rule exempting such trusts from the operation of the statute of



limitations, but they are trustees of an implied trust and are within the protection of the statute.

5. CORPORATIONS—ACTION AGAINST DIRECTORS FOR MISCONDUCT—LIMITATIONS.—An action in equity by the stockholders of a corporation against the directors, for misconduct, must be brought within the time in which the corporation itself should have brought the suit; and this rule obtains where a stockholder is a minor.

Appeal from Columbia Chancery Court; *James M. Barker*, Chancellor; affirmed.

*Gaughan & Sifford*, for appellant.

1. The directors were liable for mismanagement and neglect. 129 Ark. 416; 168 N. Y. 157, 110 Ark. 40; 92 *Id.* 327.

2. No demand on the president and board of directors to bring this suit was necessary, as they were the guilty parties. 96 Ark. 281; 126 Ark. 72; 2 Cook on Corp., § 701.

3. The suit was not barred by limitation. Plaintiffs had no knowledge of the loss. 71 Ark. 382; 196 S. W. 803; 39 L. R. A. (N. S.) 173; 97 N. E. Rep. 897.

*Stevens & Stevens*, for appellees.

1. The demurrer was properly sustained. There was no gross negligence nor breach of trust. 104 U. S. 450, 460; 8 S. W. 886; 17 Fed. 46; 96 Ark. 291; 126 *Id.* 72; 96 *Id.* 281; 104 Ark. 84. There are no allegations nor proof of fraud. Negligence must be proven. 15 L. R. A. 316; 18 Atl. 824; 46 N. J. Eq. 25. See also 75 Fed. 781; 15 L. R. A. 317; 55 *Id.* 775 and notes.

2. Mrs. Magale is estopped. She was informed of condition. She had no personal interest in the funds. 15 S. W. 449, 452; Cook on Stock, etc. (2 Ed.) 701.

3. The action is barred. Morowitz on Corp., § 271; 15 S. W. 448; 39 L. R. A. (N. S.) 49; 29 C. C. A. 529; 36 *Id.* 402. Directors are not express trustees. 15 S. W. 453; Morowitz on Pri. Corp., 271, etc. They are only gratuitous mandatories and only liable for fraud or gross negligence. 19 L. R. A. 316; 6 S. W. 586; 141 U. S. 133. See also 195 S. W. 674; 94 Ark. 429; 92 *Id.* 359, etc.

## STATEMENT OF FACTS.

This is a suit in equity brought by Mrs. Mary G. Magale and John F. Magale, as stockholders of the Columbia County Bank, against C. M. Fomby and others, as directors of said bank, to recover for the bank for the benefit of its creditors and other stockholders, the sum of \$30,000 for which they allege that the directors are liable by reason of their neglect and mismanagement of the affairs of the Bank in the respect averred in their complaint. The material facts are as follows:

In the early part of the year 1909, a corporation was organized at Magnolia, in Columbia County, Arkansas, for the purpose of operating a canning factory, and at once began doing business with the Columbia County Bank of the same place. J. O. Hutcheson was cashier of the bank and had \$4,000 stock in it. He became a stockholder of the Magnolia Canning Factory and had \$500 stock in it. C. M. Fomby was president of the bank. He had \$3,000 stock in it and \$100 stock in the canning factory. At the time the bank commenced to do business with the canning factory, the following were directors of the bank: R. L. Emerson, C. M. Fomby, A. B. Murphy, J. O. Hutcheson, C. R. Hutcheson, J. E. Smith, S. O. Couch, T. J. Blewster, D. R. Carrway, J. M. Witt, W. H. Aschew, C. W. Mitchell and J. C. McNeil. Since the institution of this suit the following of those named have died: A. B. Murphy, W. H. Aschew, A. J. Carter and R. L. Emerson. The balance of those first named, except J. E. Smith and S. O. Couch, served as directors from then on until the bringing of this suit.

T. J. Blewster had \$110 of the canning factory stock and \$1,000 of the bank stock. The cashier of the bank was a director in both companies, as were also T. J. Blewster and J. O. Hutcheson. A. J. Carter was president and T. J. Blewster was secretary of the canning factory. A. J. Carter became a director of the bank in 1910, and remained as such until his death in the year 1914. The property of the canning factory consisted of a

canning outfit, buildings and machinery. The buildings were placed on leased lands so as to be near the railroad track and no provision was made for the removal of the buildings at the termination of the lease. The lease was for a period of nine years from August, 1908, at the price of fifty dollars per year. The canning factory had a capital stock of \$10,500 which was paid up at the time it began to do business. The bank had a capital of \$50,000 which was all paid. The original capital stock of the canning factory was expended in the erection of the buildings and the purchase of machinery in the preparation of operating its plant. The first loan from the bank to the canning factory was in the spring of 1909. This money was spent in buying machinery and getting ready for business. On the first of January, 1910, the canning factory was indebted to the bank in the sum of \$13,497.00. At the close of January, 1911, the indebtedness was \$20,314.00. On the first of January, 1912, the canning factory owed the bank \$29,421.04. The indebtedness was evidenced by the notes of the canning factory, overdrafts and accounts. No security was given until the latter part of 1911, when the canning factory gave the bank a mortgage on its buildings and machinery. No profit was ever made on operating the canning factory. During all this time it was operated at a loss. The bank stopped business with the canning factory on December 15, 1911, and at that time the canning factory had very little manufactured goods on hand. The bank first took a mortgage for the whole amount of the indebtedness, but later on charged off \$16,000.00 and took a new mortgage for the balance in 1913. Later on the stockholders of the bank paid this amount, which was something near \$13,000, at the suggestion of the State Bank Examiner, in order that the bank might make a better showing. Mrs. Mary G. Magale gave her note for \$1,000.00 of this amount and subsequently paid it.

J. O. Hutcheson was a director in both corporations. He testified that he talked with Mrs. Magale several times about the indebtedness of the canning factory to

the bank; that he had his first conversation with her early in 1912, and later talked with her several times about it during the year.

J. C. McNeil, the cashier of the bank, testified that he talked with Mrs. Magale about the business with the canning factory in the years 1910, 1911 and 1912; that she frequently asked him about the bank's business and how the canning factory was getting along; that she talked with him frequently in the year 1912, and knew that the canning factory owed the bank a considerable debt and that there would be a loss.

Mrs. Magale denied that she knew anything about the indebtedness of the canning factory to the bank until the bank made a statement sometime in 1914. She said she gave her note for one thousand dollars with the understanding that she was to be paid back. At the time the suit was instituted, Mrs. Mary G. Magale owned eighty shares of stock in the bank of the par value of \$2,000. Her son, J. F. Magale, owned \$2,000 of the stock. The suit was filed on October 15, 1915. John F. Magale, at this time, was nearly twenty-three years of age. During 1912 and 1913, the canning factory was operated independently of any assistance from the bank, that is, the persons operating it guaranteed the bank from any loss and agreed to pay the profits, if any, upon the old indebtedness to the bank. No profits, however, were made and no payment was made upon the old indebtedness. H. D. Hutcheson was the manager of the canning factory during these years and he had no connection with the bank. The losses sustained by the canning factory were due to the hazards of the business rather than to any mismanagement of its officers. The record shows that the officers bent every energy toward making the canning factory a successful financial venture, but the losses occurred on account of the canning factory undertaking to raise products to be used in running its business and from the failures in the crops and from other hazards connected with its business.

The court found the issues in favor of the defendants and a decree was entered dismissing the complaint for want of equity. The plaintiffs have appealed.

HART, J., (after stating the facts).

(1-2) The cause of action set forth in the complaint is cognizable in a court of chancery. The liability of the directors of the bank for negligence in the discharge of their duties and the jurisdiction of courts of equity to afford redress to the corporation, and in proper cases to its shareholders, in cases of this sort exists independently of any statute. *Bank of Commerce v. Goolsby*, 129 Ark. 416, 196 S. W. 803. Actions to recover such losses should in general be brought in the name of the corporation, but if it refuses to prosecute the action, the stockholders who are the real parties in interest, will be permitted to sue in their own names. In the present case it appears that the corporation was still under the control of the directors who are defendants to the action. The president of the corporation stated that they would not have brought the action for the corporation, and the demand upon the corporation to have brought the suit would have been futile and unnecessary. A suit prosecuted under the direction and control of the parties against whom the misconduct is alleged and a recovery is sought, would not afford the shareholders the relief to which they are entitled. If the stockholders could not be allowed to assert their own rights in a court of equity, the directors so long as they remained in office, could hold them in defiance and their wrongful acts might lead to the wreck of the corporation.

(3) Again it is argued that the officers were not liable. In the case of *Bank of Commerce v. Goolsby*, *supra*, it was held that the directors of a bank, constituting its governing body, are liable to stockholders as well as depositors for its losses from their negligence in not knowing its condition and seeing that its affairs are honestly and properly managed. In the present case the capital stock of the canning factory was \$10,500, and the

capital stock of the bank was \$50,000. The capital stock in both corporations was fully paid up. The capital stock of the canning factory was all used in the erection of buildings and the purchase of machinery for the conduct of its business. They even borrowed an additional amount of \$1,200 which was used in the purchase of machinery before it began business. Its business for the year 1909 resulted in a loss, so that on the first day of January, 1910, its indebtedness to the bank was \$13,497.00. The bank with the knowledge and consent of the directors continued to make loans to the canning factory until on January 27, 1911, the indebtedness amounted to \$20,314.00. The directors still continued to make loans to the canning factory until on January 1, 1912, the indebtedness of the canning factory to the bank amounted to \$29,421.04. No security was demanded or received on this indebtedness. It is true the bank took a mortgage on the buildings and machinery of the canning factory in the latter part of 1911, but this was done in order to protect the bank from any future losses arising from the operation of the canning factory. It does not appear that the directors of the bank are guilty of any actual fraud in making the loans to the canning factory. On the contrary, it appears that they believed the business would be successful. It is not shown, however, that any of them had had any experience in operating a canning factory. It turned out to be a hazardous business and one that required skill and experience on the part of those managing it in order to make it a success. It is true the canning factory owned its own buildings and machinery, but it placed them upon leased ground for a term of nine years without any provision in the lease that it should be permitted to move its buildings at the expiration of its term. It is a significant fact that during the three years the bank did business with the canning factory the latter became indebted to it in a sum nearly equal to three-fifths of the bank's capital stock. During these three years no security was demanded or received by the bank from the canning factory. The directors

loaned large sums of money to an enterprise which depended entirely upon its profits for a repayment of the loan. These facts the directors of the bank must have known. Under the circumstances they were guilty of such reckless conduct in the management of the affairs of the bank as to constitute negligence within the meaning of the principles of law decided in *Bank of Commerce v. Goolsby, supra*.

(4) It does not follow, however, that the plaintiffs are entitled to recover in this case. The defendants rely upon the statute of limitations of three years to defeat the action. Sec. 5064 of Kirby's Digest provides that all actions founded upon any contract or liability, expressed or implied, not in writing, shall be commenced within three years after the cause of action shall accrue. In some jurisdictions as in the State of Massachusetts, the court has held the directors to be trustees in whose favor the statute does not run during the continuance of the trust. *Greenfield Savings Bank v. Abercrombie et al.*, 39 L. R. A. (N. S.) 173. In other jurisdictions it is held that directors of banks are not trustees of an express trust within the rule exempting such trusts from the operation of the statute, but that they are trustees of an implied trust and are within the protection of the statute. *Baxter v. Moses*, 77 Maine 465, 52 Am. Rep. 783; *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625, and *Cooper v. Hill* (Ct. Ct. Appeals, 8th Circuit) 94 Fed. 582. This court has adopted the latter view. *Bank of Commerce v. Goolsby, supra*. It was there held that the trust with which the property of the bank was impressed in the hands of directors arises from the common law and from their acceptance of the office they hold. In other words while there is no express declaration of trust, their liability in cases of this sort is implied from their official relation to the bank and there is an implied or resulting trust created by operation of law when they became directors of the bank. In the case of *Bank of Commerce v. Goolsby, supra*, the court said:

"The duties of directors are perhaps nowhere better stated than in a syllabus, showing the holding of the court, in *Wallace v. Lincoln Savings Bank*, 89 Tenn. 631, 15 S. W. 448, 24 Am. St. Rep. 625, as follows: "Bank directors are held to the exercise of only ordinary care and diligence in the discharge of their duties. They are not required to give their whole time and attention to the performance of these duties, but only so much as, under the special circumstances of each particular case, may be demanded for the reasonable protection of the interests committed to their care. They are not insurers of the fidelity or capacity of the cashier or other agents to whom the business and assets of the bank may be intrusted, but are required to exercise due care in their selection and proper supervision over their action."

In the Tennessee case just referred to, as well as the other above cited with it on this point, it was held that the statute of limitation may be invoked in their defense by directors in suits like the one under consideration. In the present case there has been no fraudulent concealment of their acts by the directors that would delay the operation of the statute of limitations. The cashier of the bank testified that he had frequent conversations with Mrs. Magale about the affairs of the bank and the condition of the canning factory during the years 1909, 1910 and 1911. In the latter part of December, 1911, the transaction of the bank with the canning factory was closed up and a mortgage was taken upon the buildings and machinery of the canning factory to secure the indebtedness. After that the canning factory was operated under a different management and under a guarantee that the bank should not suffer any further loss. One of the directors of the bank says that he talked with Mrs. Magale in the early part of 1912, and told her about the conditions as they then existed; that he thereafter during the year 1912 had frequent conversations with her in regard to the condition of the affairs of the bank and the canning factory. It is true Mrs. Magale denies that she had any knowledge of the condition of the affairs



between the bank and the canning factory until the bank issued a statement in 1914. Opposed to her testimony, however, is the testimony of the cashier of the bank and one of its directors. When we consider that the bank and the canning factory were both situated in the town of Magnolia and that Mrs. Magale lived there, a preponderance of the evidence shows that she had knowledge of the conditions as they existed. This suit was not commenced until October 15, 1915. This was more than three years after the transaction under consideration had been closed up and Mrs. Magale had knowledge of that fact. No acts of negligence on the part of the directors occurred within three years before the bringing of the action and their liability implied from their relation to the bank is barred by the statute of limitations.

It follows that the decree must be affirmed.

HART, J., (on rehearing). In the case of *Bank of Commerce v. Goolsby*, 129 Ark. 416, 196 S. W. 803, cited in our original opinion, it was held that where a statute places banking corporations under the control of boards of directors, corresponding duties and liabilities, in the absence of any statute, must be ascertained and controlled by common law rules applicable generally to their relations and powers. So we held (there being no statute defining their liabilities) that it rested on the implied liability created under the law by the relation of the directors, as its officers, to the bank. The transaction of the bank with the canning factory so far as the negligence of the directors is concerned was closed when the bank had a settlement with the canning factory, took a mortgage to secure it for the balance due it, and refused to make any further advances to it. This occurred in December, 1911. Thereafter other persons leased the plant of the canning factory and operated it. It is true they secured a loan from the bank but they did this wholly on their personal endorsement just as any third person might do and neither the canning factory as a corporation, nor its assets

were in any way involved. Therefore, we adhere to the ruling in our original opinion that the statute of limitations began to run in December, 1911.

(5) John F. Magale was a minor at the time the suit was brought. He was a stockholder of the bank and joined with his mother in bringing the suit. On account of his minority, it is claimed that the statute of limitations has not run against his cause of action and that a rehearing should be granted as to him. The proper mode of enforcing the liability of the directors in a case of this sort is by a suit in equity on behalf of all the creditors and in which the corporation itself is a party. Clark & Marshall on Private Corporations, Vol. 3, Par. 832, p. 2643, and Mitchie on Banks and Banking, Vol. 1, Sec. 55 (3).

In Cook on Corporations (7th Ed.), Vol. 3, par. 701, it is said: "The usual and proper remedy is for the corporation itself to institute a suit at law against the guilty directors. If, however, the corporation is under the control of the guilty parties, or if it refuses to sue when requested by stockholders to do so, then the stockholder himself may bring suit in equity in his own behalf, and in behalf of all other stockholders who may wish to come in, making the corporation and the guilty parties the defendants, and compel them to make good to the corporation the corporate money or property lost by their negligence. The money or property recovered in such an action belongs to the corporation, and not to the stockholder who brings the suit."

Hence it will be seen that the suit when instituted by the stockholder is a derivative one and for that reason must be brought within the time in which the corporation itself should have brought the suit.

It follows that the motion for rehearing will be denied.

PAYNTER *v.* LITTLEFIELD.

Opinion delivered February 4, 1918.

**RESCISSION OF DEEDS—FRAUD—DELAY.**—The right of rescission of a deed after an exchange of lands, on the grounds of fraud, will not be lost, where the party seeking relief is entitled thereto, and under the circumstances of the case has acted with reasonable diligence.

Appeal from Scott Chancery Court; *Wm. A. Falconer*, Chancellor; affirmed.

*A. G. Leming* and *Hon & Woods*, for appellant.

1. The decree should be reversed on the evidence alone. The parties dealt at arm's length with each other. The deal was made after due investigation and full knowledge of all the facts. There was no fraud nor false representations made by appellant. No offer to rescind was made nor effort to put appellant *in statu quo*. 24 A. & E. Enc. L., 625; 6 Cyc. 312-314.

If Littlefield ever had the right to rescind he forfeited it and is estopped. 1 Paige on Cont. 222. On discovery of fraud rescission must be offered at once. 192 U. S. 232.

2. Littlefield is estopped by his acts. Story Eq. Jur. (12 Ed.), § 1546; 2 Parsons on Cont. (7 Ed.), 935; Ann. Cases 1912 C. 407, 412. The offer to rescind must be prompt. 9 Cyc. 436, Pomeroy on Specific Performance, § 222; Ann. Cases 1913, C. 383; Ann. Cases 1917, A. 483; see also 6 Am. St. 899; 14 *Id.* 716; 99 *Id.* 413; 134 *Id.* 417; 131 *Id.* 346; 245 Ill. 14; 137 Am. St. 301; 189 S. W. 57; 196 *Id.* 236; 116 Ark. 443; 194 S. W. 234; 192 *Id.* 231; 33 Ark. 468; 80 *Id.* 543; 89 *Id.* 349; 95 *Id.* 449; 97 *Id.* 589; 117 *Id.* 93; 115 *Id.* 89; 188 S. W. 571; 125 Ark. 572; 128 Ark. 353; 125 Ark. 146.

3. Littlefield can not retain possession and avoid payment. 27 Ark. 162; 31 *Id.* 151. He was not evicted. There was no fraud, but if so, he must offer to rescind. 40 Ark. 420. After deeds are executed, a court of equity will not rescind the contract for misrepresentation as to encumbrances, but leave the party to his remedy at law. 22 Ark. 198. If rescission for fraud is sought, on

discovery of the fraud, the purpose must be announced at once and adhered to. 46 Ark. 337.

4. Representations as to value are mere expressions of opinion, puffing, on which a purchaser relies at his own risk, and are no ground for action for false representations or rescission. 82 Ark. 20; 112 *Id.* 489. A statement of intention of doing certain things in the future, although made with intent to deceive, will not, even if relied on, form the basis of an action for fraud and deceit. 121 Ark. 23; 124 *Id.* 308. Sickness or feeble health is no ground for rescission. 23 Ark. 175.

*Bates & Duncan and Carmichael, Brooks & Rector*, for appellees.

1. The evidence sustains the decree of the court. The representations were false and fraudulent and were relied on by appellees. The relation of the parties was confidential. 129 Ark. 498.

2. The representations of appellant constitute fraud. 129 Ark. 498; 128 Ark. 353. They were relied on and wrought injury. 71 Ark. 91; 112 *Id.* 489; 47 *Id.* 148; 118 N. W. 423; 125 U. S. 247; 97 Fed. 854; 55 Ark. 299; 46 N. W. 540; 107 Ill. 302.

3. The doctrine of estoppel can not be invoked by appellant. 129 Ark. 498.

SMITH, J. The nature of this suit appears from the findings of fact made by the court below, from which we take the following recitals. On and previous to August 23, 1915, C. G. Littlefield and V. V. Littlefield, his wife, were the owners of a farm of 280 acres in Cloud County Kansas, of which 200 acres were in cultivation, and the balance in pasture, and the land was highly improved. It was at that time, however, encumbered with a first mortgage for \$5,000.00, and a second mortgage for \$3,600.00, which embraced also a number of head of live stock and the farm implements on the place. About this time Littlefield was advised by his physician, on account of his

health, to seek a milder climate, and he accordingly listed the farm for sale with one Houser, a real estate agent at Concordia, Kansas. At this time A. J. Paynter, who was an experienced land trader, owned a tract of land in Scott County, Arkansas, containing 644 acres. These were "cut-over" lands, and almost wholly unfit for cultivation, and possessed but little value, or no marketable value when denuded of their merchantable timber. Paynter had owned these lands for some time and was familiar with their character, location and value. On the date first mentioned above a suit was pending against Paynter in which damages were claimed in the sum of \$1,270, and these lands had been attached and a *lis pendens* notice had been filed in said suit, of all of which facts Paynter was, at the time, fully advised. About this time Paynter drove to the home of Littlefield, a distance of nine miles from the nearest railroad, and, upon learning that Littlefield was a member of the Independent Order of Odd Fellows, introduced himself as a member of said Order, and represented to Littlefield that he owned four quarter-sections of land in Scott County, Arkansas, covered with virgin pine timber, which had been cruised by an expert timber estimator and was estimated to have from 2½ to 3 million feet of merchantable pine timber thereon, which he would sell, and had contracted to sell, within sixty days, at \$2.50 per thousand feet; that there was a good house on the land, and fine springs of water, and about 40 acres in cultivation on each quarter section; and that the land was worth at least \$20.00 cash per acre, and was situated within nine miles of Waldron, the county seat. Neither Littlefield nor his wife had ever been in Scott County, Arkansas, and knew nothing whatever about the land, or its value, and they relied wholly on the warranties and representations of Paynter, which were, in fact, wilfully and knowingly false and were made with the intention to defraud and, by reason thereof, the Littlefields were induced, on said date, to enter into a written contract with Paynter for the exchange of lands. By the terms of this contract, and as a part of the con-

sideration therefor, Paynter guaranteed that the Arkansas lands would easily carry a loan of \$4,000 without the merchantable timber thereon, and Paynter agreed to procure a loan of that amount, due five years after date, and to discharge the second mortgage on the Kansas lands, and caused the Littlefields to execute such a mortgage in blank.

The agent, Houser, at the instance of Paynter, went to Kansas City for the purpose of selling this mortgage, but failed to find a purchaser therefor, whereupon Paynter inserted his own name as mortgagee. Paynter then procured the satisfaction of this second mortgage by executing his own second mortgage on the Kansas land for \$2,000, and by collecting \$700 advance rent on the land, and by himself advancing \$1,300, making the total of \$4,000, the amount named in the mortgage which the Littlefields had executed in blank and in which Paynter inserted his own name as mortgagee. By this transaction the Kansas lands, which the court found to be of the value of \$16,800, were cleared of all incumbrances except the \$5,000 mortgage executed by the Littlefields, and the \$2,000 mortgage executed by Paynter. The court found that at that time the Arkansas lands, free of all encumbrances, were worth not to exceed \$1,600.00, and, by this transaction, Paynter had secured an equity in the Kansas lands worth \$7,800, and, in addition, had a mortgage on the Arkansas land for \$4,000.00.

The evidence upon which these findings were made is in irreconcilable conflict. According to Paynter, and the testimony introduced in his behalf, the parties dealt with each other at arm's length and each relied upon his own investigation and judgment, and no fraudulent representations whatever were made. But, from the correspondence between the parties, and other testimony which appears in the record, the court below found that Paynter had, by dealing with Littlefield as an Odd Fellow, gained his confidence and lulled him into a sense of security, which prevented him from making the investigation which would have revealed the utter falsity of the

representations which were made in regard to the Arkansas lands. The testimony appears to fully warrant the findings of the court set out above.

It further appears that, shortly after the exchange of the properties as set out above, Paynter conveyed the Kansas lands to an innocent purchaser and thereby put it beyond the power of the law to rescind the fraudulent sale and restore the *status quo*.

The mortgage on the Arkansas lands matured, but the indebtedness there secured was not paid, whereupon this suit was brought as a proceeding to foreclose that mortgage. By answer and cross-complaint the invalidity of this mortgage was alleged, and there was a prayer for its cancellation, and for general relief against the fraudulent conduct of Paynter. In opposition to the granting of this relief, Paynter, in a reply to the cross-complaint, alleged a ratification of the sale of the land by the conduct of Littlefield subsequent to the execution of the deeds and the mortgage. The conduct of Littlefield which is said to constitute a ratification of the exchange of lands consisted in the sale, in 1916, of the pine timber on one of the quarter sections for \$225.00, and the execution of an option for the timber on another quarter section for the same amount of money; and also in the fact that no request for rescission was made until the foreclosure proceedings were commenced. It was shown by the Littlefields, however, that the suit in which the Arkansas land was attached had never been settled and the *lis pendens* notice was still in force when the foreclosure proceeding was commenced on October 2, 1916. A letter to Littlefield from Paynter asserted his expectation of a favorable termination of the pending litigation by May, 1916, and in this letter he reiterated his purpose and desire "to do what I agreed to," and in the letter he repeated his statement that he had a contract for the sale of the timber at a price of \$2.50 per thousand, based upon an estimate of from 2½ to 3 million feet; and in February, 1916, he deposited the mortgage with a bank in Concor-

dia, Kansas, as a pledge that he would clear the title to the land by June, 1916.

In view of the reiteration of these statements, which the court found to be false, and of the renewed promises to perform, Paynter is in no position to complain that Littlefield continued to rely upon the representations made to him. A recent and similar case is that of *Cady v. Rainwater*, 129 Ark. 498, 196 S. W. 125, where other cases on the subject are cited. There the right of rescission was awarded after a longer delay than has occurred here, and we there said that the right of rescission would not be denied one who was shown to be entitled thereto where reasonable diligence, under the circumstances of the case, had been exercised in asking that relief. We think there has been no such delay or ratification here as makes it inequitable to grant Littlefield the relief which was decreed him. This relief consisted in canceling the note and mortgage sued on and in finding the difference in value between the properties traded and in awarding judgment for that amount, less certain credits to which Paynter was shown to be entitled. Decree affirmed.

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GARNET CARTER COMPANY v. CARVER & SMITH.

Opinion delivered February 4, 1918.

CONTRACTS—OFFER AND ACCEPTANCE—ACCEPTANCE IN OTHER TERMS.—

Where an offer is made, the offer can not be materially altered by the other party, and become a binding agreement, without the consent of the party making the original proposition.

Appeal from Greene Circuit Court; *R. H. Dudley*, Judge; reversed.

*R. P. Taylor*, for appellant.

1. The verbal promise to advertise, if one was made, preceded the signing of the contract and was merged therein. 129 Ark. 354; 75 Ark. 206; 94 *Id.* 120.

Parol testimony is not admissible to contradict or vary or add to any of the terms of a written contract.



196 S. W. 800; 83 Ark. 283; *Ib.* 240; *Ib.* 105; 80 *Id.* 505; 20 Tenn. 415.

Faulkner had no authority to make the advertising contract, but if he had, that was an independent contract or obligation. The contract was complete and binding.

2. The court erred in its instructions.

*Block & Kirsch*, for appellee.

1. The proposal was never accepted in the terms made and therefore no contract was ever consummated. Page on Cont., § 1209; 100 Ark. 360.

The agent had authority to make advertising contracts. But there never was an acceptance of the terms of the contract, hence no contract. 39 Ark. 568; 97 *Id.* 613.

2. There is no error in the instructions.

HUMPHREYS, J. Appellant, a corporation, brought suit on the 15th day of July, 1916, before a magistrate in Clark township, Greene County, Arkansas, against appellees, a partnership, for \$50 on open account for profit sharing coupons and certificates. The cause was tried upon the evidence and a judgment rendered in favor of appellees. An appeal was prosecuted to the circuit court of Greene County and there tried by a jury upon the evidence and instructions of the court. A verdict was returned in favor of appellees and a judgment rendered in accordance with the verdict. An appeal has been properly prosecuted from that verdict and judgment to this court.

The evidence tended to show that Carver and Smith were partners in the gents' furnishing business in Paragould, Arkansas, and that G. J. Faulkner, agent and representative of appellant, a Tennessee corporation, engaged in the trading stamp business, entered into a contract with appellees to sell it profit sharing coupons to be used in the retail business for fifty dollars.

On the other hand, the evidence tended to show that the partnership was in contemplation only, and that the

contract was not to become effective until the partnership was formed and its name designated.

The purported contract is in writing and made in accordance with a regular form used by appellant in the conduct of its business. It contains five paragraphs. The first paragraph fixed the price per thousand of the coupons and certificates; the second provided for the redemption of the coupons and certificates with premiums specified in the company's catalogue; the third provided against the sale of coupons and certificates to other parties engaged in the same business; the first part of the fourth provided for the period the contract should run and how it might be terminated, and the latter part of the fourth paragraph is as follows: "It is further expressly agreed that this contract shall not be binding upon the company until it is signed by its duly authorized officer or agent in the city of Chattanooga, Tennessee, and said city shall be considered as the place where this contract is executed." Among other things, the fifth paragraph provided that no verbal agreement between the salesman and purchaser should be binding on the company and that the written contract contained all the terms, conditions and stipulations agreed upon.

After the signature of the parties, an order blank was filled out for the number of certificates, coupons, catalogues and other goods ordered by Carver & Smith.

The undisputed evidence was to the effect that the agent of appellant, G. J. Faulkner, was authorized to make collateral agreements with newspapers, subject to the approval of the company, for a limited amount of advertising for the benefit of the parties to whom they sold the coupons, certificates, etc., and that the Carver & Smith contract with the Paragould newspaper sent in provided for the advertisement to appear twice a week for twelve weeks, which would make twenty-four insertions; that the two writings and order for the goods were sent to appellant in Chattanooga for approval; that the newspaper contract was changed without the consent or knowledge of appellees, so as to provide for six weeks'

instead of twelve weeks' advertisement with two insertions weekly. On the 16th day of March, 1916, appellant wrote, properly stamped and mailed a letter to appellees in which it notified them of the receipt of their order and advised them that the certificates, coupons, etc., were being printed. About three weeks thereafter the goods arrived, but were refused by appellees. They remained, however, for several weeks in appellees' store but were not opened for the reason that appellant had done no advertising. Later, the goods were returned and appellant refused to accept them. Appellant did not return the contract, as changed, to the publisher for the reason that appellees refused to accept the shipment and did not notify appellees of the change in the contract. Both appellees testified that the reason they did not receive the goods and pay the purchase price was that the appellant did not do the advertising it agreed to do.

It is insisted that the court erred in refusing to instruct peremptorily for appellant for the reason, it is said, that the written contract signed by Odie Smith for appellees, and approved by appellant, provided that the writing contained all the terms, conditions and stipulations; and that no verbal agreement between the salesman and purchaser should be binding on appellant. The argument of counsel would be conclusive if the writing was a completed contract when signed, and if the undisputed evidence did not show that appellant's agent or representative had authority to make a collateral, limited advertising contract for the benefit of its customers and exercised that authority by contemporaneously agreeing with appellees to make an advertising contract with the Paragould newspaper for two insertions for twelve weeks. It was provided by another clause in the writing that the contract should not become binding until it was signed by appellant's duly authorized agent in Chattanooga, Tennessee; and it was admitted by appellant's president that its representative had authority to make an advertising contract for the benefit of appellees and that such a contract, pursuant to the agreement, was

made with the Paragould newspaper on the same day and sent in. The connection between the two writings being established by the undisputed evidence, they constituted the conditions of a proposed purchase of coupons, certificates, etc., by appellees from appellant. In order to convert this proposal or offer into a binding contract, it was incumbent upon appellant to unqualifiedly accept the proposition according to its terms. It could not materially modify the proposed terms without the assent of appellees and by acceptance, as modified, bind them. *Scaife v. Byrd*, 39 Ark. 568; *Cage v. Black*, 97 Ark. 613. Instead of accepting the proposed contract in terms, appellant changed the proposal for advertising from two insertions weekly for twelve weeks, to two insertions weekly for six weeks. Appellant having failed to unconditionally accept the terms proposed, it follows that no binding contract was entered into between the parties. The suit is based on an alleged contract. Having failed to establish a contract, appellant had no cause of action, and could, therefore, suffer no prejudice by reason of instructions given or refused by the court.

Under this view of the case, it is unnecessary to discuss the other questions presented by learned counsel in behalf of appellant.

No error appearing in the record, the judgment is affirmed.

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COLLIER v. SMITH.

Opinion delivered February 4, 1918.

1. **TAX SALES—COLLATERAL ATTACK.**—Actual payment of taxes can not avail on collateral attack where the land was sold by decree of court in accordance with the statutes of the State.
2. **TAX SALE—INCORRECT ASSESSMENT LIST.**—An assessment list furnished the collector by the board of a road district was for the taxes of 1912, but the collector reported the lands delinquent for 1911; an action, however, was brought for the delinquent taxes of 1912, and the 1912 taxes were delinquent and unpaid, and the land was sold and deed made. *Held*, these facts were a matter of

defense, if at all, available in the original suit, but not available on collateral attack.

3. **TAX SALES—REDEMPTION—LAPSE OF TIME.**—Where more than one year expired after the date of sale by the commissioner in chancery, before appellee offered to redeem, no redemption is possible under act 248, Acts of 1911.
4. **TAX SALES—REDEMPTION.**—Act 43, Acts 1915, does not relate back so as to affect vested rights in property acquired before its passage.

Appeal from Jefferson Chancery Court; *John M. Elliott*, Chancellor; reversed.

*Coleman & Gantt*, for appellant.

1. The tax sales were regular and made according to law. The commissioner's deed was duly acknowledged and recorded. Kirby's Digest, §§ 760-1. It was *prima facie* evidence of the legality and regularity of the sale. The decree and deed were duly approved and confirmed and there were no irregularities in the road district suit. 28 N. E. 57.

2. The attack is a collateral attack on the decree of the court and every presumption is in favor of jurisdiction and regularity. 121 Ark. 474; 101 *Id.* 390; 50 *Id.* 188; 55 *Id.* 398. Mere errors and irregularities are no grounds for vacating a judgment on collateral attack. 118 Ark. 449. The act (Acts 1911, No. 248) was complied with in all things and the court had jurisdiction and the matter is concluded by the decree. 16 R. C. L. 32-34; 2 Wall. 210.

3. Appellant had the right to purchase at the tax sale and was under no duty to pay the taxes. 98 Ark. 455; 74 *Id.* 253; 53 *Id.* 428; 37 Ark. 1352.

4. Appellees had no right to redeem. Acts 1911, No. 248 § 7. They had only one year to redeem and that had passed. There is no exception in favor of minors. Acts 1911, p. 773; Acts 1915, No. 43. The act does not act retrospectively nor divest vested rights. 5 Ark. 217; 68 *Id.* 333; 49 *Id.* 190; 43 *Id.* 424; etc.

*Rowell & Alexander*, for appellees.

1. The decree condemning the land to sale was void on account of the failure of the collector to make a return

of delinquent taxes for 1912 and the right to redeem existed under Act 43, 1915.

2. The decree was subject to collateral attack for want of jurisdiction. 83 Ark. 532; 60 *Id.* 374; 98 *Id.* 457.

3. Appellees had the right to redeem. Act 43, 1915. It was retroactive. 128 Ark. 113, 90 S. W. 600, etc.

HUMPHREYS, J. On the 7th day of January, 1907, appellees purchased the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , Sec. 14, T. 6 S. R. 10 W., in Jefferson County, Arkansas. They permitted the land to forfeit in 1912 for the non-payment of the state and county taxes assessed against it in 1911, and at the delinquent tax sale, Thomas J. Collier, appellant, purchased the land on June 10, 1912, and procured a tax deed under said purchase on December 7, 1914. The land was proceeded against under Act 248 of the Acts of Arkansas, 1911, for non-payment of 1912 taxes of Road Improvement District No. 3, which resulted in a decree, of date September 18, 1913, subjecting the land to sale to satisfy the lien for said road improvement district taxes. The decree recited the performance of all statutory requirements necessary to give the chancery court jurisdiction in said road district suit.

Pursuant to the decretal order, the land was sold by the commissioner on October 16, 1913, and purchased by Thomas J. Collier, the appellant herein. The commissioner filed his report, and the sale was confirmed and deed ordered. On October 31, 1913, thereafter, the commissioner presented his deed to the court for approval and the deed was examined, approved and acknowledged in open court and delivered to the purchaser, Thomas J. Collier. Immediately after the purchase by appellant under the tax forfeiture of 1911, he assessed the property in his own name and thereafter paid all state, county and general, and special improvement district taxes, on said real estate. During all this time, the appellees remained in possession and enjoyed the free use of the property.

On March 16, 1916, appellant brought suit in ejectment against appellees in the Jefferson Circuit Court,

asserting title and right of possession under his tax deeds. Appellees, through their father and guardian, J. W. Smith, filed answer, challenging the validity of both tax deeds. The tax sale and the tax deed issued by the clerk of the county were challenged for the alleged reason that no taxes for the year 1911 were levied on the land by the levying court of Jefferson County; and the commissioner's deed was challenged on the ground that the collector never returned the land as delinquent for the taxes of 1912 to the commissioners of Road Improvement District No. 3.

They assert that the tax deeds were clouds upon their title and prayed that the cause be transferred to the chancery court and that said deeds be canceled and held for naught; and prayed in the alternative that if the commissioner's deed were sustained that they be permitted to redeem under Act No. 248 of the General Assembly of the State of Arkansas, 1911; but that if the time for redemption under that act had expired, that they be permitted to redeem under Act No. 43 of the General Assembly of the State of Arkansas, 1915, approved February 9, 1915.

The cause was transferred to the chancery court and there heard upon the pleadings, agreed statement of facts, depositions and documentary evidence, from which the chancellor found that appellees, being minors, had a right to redeem the land in controversy from the tax sale under the tax forfeiture of 1911; and that the collector failed to return the lands as delinquent for the special taxes of 1912 to the commissioners of said road district, and for that reason the chancery court had no jurisdiction to condemn and order a sale of the lands for a tax of Road Improvement District No. 3 in Jefferson County, Arkansas; and also found that Thomas J. Collier did not purchase at the commissioner's sale to strengthen his title but was of necessity forced to purchase in order to protect his title acquired under the forfeiture of 1911, and that the purchase amounted to nothing more than a payment of taxes due Road Improvement District No. 3.

In accordance with the findings aforesaid, the court then canceled both tax deeds and required the appellees to refund to Thomas J. Collier the aggregate sum of \$81.70, together with interest at the rate of 10 per cent. per annum from the date of the respective payments until paid, that being the total amount the said Collier had expended in procuring his tax titles and paying general and special taxes on said land thereafter.

(1-2) It is not seriously contended by appellees that the sale for the taxes of 1911 for general, state and county purposes was void, but they seem contented with their conceded right to redeem from that sale. It would **not benefit them to exercise their right of redemption**, however, if they can not successfully attack or redeem from the sale of the land for the 1912 taxes assessed by said Road Improvement District No. 3 against it. **This latter sale was made on the 16th day of October, 1913, by a commissioner under the provisions of Act 248, Special and Private Acts of 1911. The jurisdiction to enforce delinquent taxes due said district was placed in the chancery court by the act. The sale was made through the chancery court. The decree rendered for the sale of the lands recited on its face all necessary jurisdictional requirements. This is a collateral, and not direct, attack upon the decree of a court having jurisdiction to render such a decree. No dispute exists between the parties as to the character of the attack. The dispute between them is whether the decree can be collaterally attacked by showing that the collector reported the lands delinquent for 1911, instead of 1912. The assessment list furnished the collector by the Board of the Road District was an assessment for taxes of 1912, but when he made his report, the sheet upon which it was made reported the lands delinquent for 1911. The suit, however, was brought for delinquent taxes of 1912. The taxes for 1912 were delinquent and had not been paid. This was a matter of defense, if at all, available in the original suit, but not on collateral attack. Actual payment of taxes can not avail on collateral attack where the land was sold by decree of**



court in accordance with the statutes of the State. *Wallace v. Brown*, 22 Ark. 118; *Williamson v. Mimms*, 49 Ark. 336; *McCarter v. Neil*, 50 Ark. 188; *Burcham v. Terry*, 55 Ark. 398; *Crittenden Lbr. Co. v. McDougal*, 101 Ark. 390; *Cassady v. Norris*, 118 Ark. 449.

Appellees invoked the doctrine, in support of their contention, announced in *Van Etten v. Daugherty*, 83 Ark. 534, and *Fleming v. Weaver*, 98 Ark. 455, to the effect that judgments rendered without acquiring jurisdiction over the person and subject matter in the manner required by the statute are subject to collateral as well as direct attack. The cases are not parallel to the instant case. Service was obtained in the instant case in the manner provided by the statute, and, hence, it is controlled by the rule announced in *McCarter v. Neil*, *supra*, and the other cases cited in connection with it.

But it is insisted that the decree should be affirmed upon the theory that the purchase at the commissioner's sale, under the decree of the chancery court to enforce the delinquent taxes of 1911 against said lands, amounted to a payment of the taxes only and that it was not, in fact, a purchase to strengthen the original tax title of appellant. This contention is not sound for the reason that the rule can not be invoked unless the holder of the original tax purchase certificate was at the time of the second purchase either in possession of the land, or enjoying the benefits thereof, or was under some obligation to the original owner of the land to pay the taxes. *Staley v. Leomans*, 53 Ark. 428; *Palmer v. Ozark Land Co.*, 74 Ark. 253.

(3) The last question to be determined on appeal is whether appellees have a right to redeem the land from the commissioner's sale, of date October 16, 1913. There is no saving clause in favor of minors in the section providing for redemption by the original owner in Special and Private Act 248, in the Acts of Arkansas, 1911, creating Road Improvement District No. 3 in Jefferson County, Arkansas. The redemption section reads as follows: " \* \* \* and provided, that any land

owner shall have the right to redeem any and all lands sold at such sale within one year thereafter; which shall run from the day when the lands are offered for sale, and not from the day when the sale is confirmed." More than one year expired after the date of sale by the commissioner in chancery before appellees offered to redeem. Therefore, no redemption exists under said Act 248 in favor of appellees.

(4) But it is said the right of redemption exists to appellees under Act 43, of the Acts of 1915. This must depend on whether said act will relate back and affect vested rights in property acquired before its passage. It will be remembered that in the instant case appellant bought the land at a commissioner's sale on the 16th day of October, 1913, which sale was confirmed and in pursuance thereof a commissioner's deed was executed, presented, approved and acknowledged in open court and delivered to appellant, and the right of redemption of one year granted appellees under Sec. 12 of Act 248, of the Acts of 1911, had expired before appellees offered to redeem and before the passage of Act 43, of the Acts of 1915. It can with safety be said that appellant in this case acquired vested rights in the land by virtue of his purchase before the passage of Act 43 of Acts of 1915. The act in question did not take effect until four months after appellees' right to redeem had expired under the Act of 1911. The language of the act is broad, but it does not contain any specific clause that it shall relate back or be retroactive in its effect. Under the rule of construction adopted by this court in former cases, we can not give the act retroactive effect so as to divest vested rights. *Crittenden v. Johnson*, 14 Ark. 447; *St. L., I. M. & S. Ry. Co. v. Alexander*, 49 Ark. 190; *Fayetteville B. & L. Assn. v. Bowlin*, 63 Ark. 573; *Beavers v. Myar*, 68 Ark. 333; *Rankin v. Schofield*, 70 Ark. 83.

For the errors indicated, the decree is reversed and the cause remanded with instructions to enter a decree in accordance with this opinion.

STATE *ex rel.* THOMPSON *v.* PARKER.

Opinion delivered November 26, 1917.

1. **NAVIGABLE STREAMS—"HIGH WATER MARK."**—In an action to determine the character of, and the right to, the use of a certain area which was formerly land, but which had become permanently overflowed by the waters of a lake, due to the building of a levee across the outlet of the lake, *held*, the area in controversy, prior to the building of the levee, was not a part of the bed of the aforesaid lake. The line delimiting the bed of navigable water from its bank "is to be found by ascertaining where the presence and action of water are so usual and long continued in ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation and the nature of the soil." *Railway v. Ramsey*, 53 Ark. 314.
2. **ADVERSE POSSESSION—LAND PERMANENTLY SUBMERGED BY WATER—STATE ACQUIRES TITLE, WHEN—NAVIGABLE WATERS.**—When the waters of a natural navigable lake are extended by artificial means so as to cause the land of riparian owners to be flooded, without their consent, and this condition is not merely temporary but is continued for a sufficient length of time for the standing waters to produce a distinctive new high-water mark for the waters of the lake bed, this gives the State, as the owner of such lake bed, the possession of the lands so covered to the high-water mark. Such possession is open, for a complete submergence of one's lands in this manner could not escape observation, and, if the owner is powerless to remove the cause and to restore the lands to their former condition, such possession is also adverse, and if it continues for seven years or more without interruption, the State acquires the title to the lands so submerged, for, in such case they have become a part of the natural lake bed.
3. **NAVIGABLE WATERS—TITLE TO SOIL.**—The title to the soil in navigable waters below and to high water mark is in the State in trust for the use of the public.
4. **NAVIGABLE WATERS—TITLE TO SOIL—RIGHT TO HUNT AND FISH.**—The common right of hunting and fishing in navigable lakes is not reserved to the public as a right attached and incident to the right of navigation, but it is one that inheres in the public because the State, in trust for the public, is the owner of the soil in navigable waters to high-water mark, and the common right of hunting and fishing is incident to such ownership, as well as the other common right of navigation. The State can not alienate these rights nor abdicate the trust to hold and preserve them for the untrammelled use of the whole people of the State.

Appeal from Crittenden Chancery Court; *Geo. T. Humphries*, Chancellor; reversed.

*E. L. Westbrooke*, for appellant.

1. Horseshoe is a navigable lake. 119 Ark. 377.

2. The water and beds of navigable lakes and the fish and fowl therein are the property of the State. 3 How. (U. S.) 212; 20 *Id.* 84; 107 U. S. 678; 206 *Id.* 46; 146 *Id.* 387; 242 *Id.* 272, and many others. 119 Ark. 383; 88 *Id.* 578; Kirby's Digest, § § 4108, 4082, etc.; 16 Peters, 367; 3 How. (U. S.) 212; 209 U. S. 447, etc.; 53 Ark. 314; 29 Cyc. 291.

3. Happy Jack, Mud and Clear Lakes are State property. 53 Ark. 314; 119 *Id.* 383.

4. Under the law the present level of the lake is the natural level, where the level of a navigable lake is maintained by artificial means, the rights of the public are correspondingly extended. The State acquired title by prescription. 50 L. R. A. 836; 70 N. W. 115; 74 *Id.* 185; 91 Am. St. 965; 119 Ark. 383; 104 S. W. 819.

5. The right of the public to hunt and fish is settled. 56 Ark. 267; 54 Am. Dec. 764; 45 L. R. A. 475; 10 Am. Dec. 356; 21 *Id.* 89; 60 L. R. A. 484; 19 Cyc. 999; 58 Am. St. 33; 53 Am. St. 293; 31 Ann. Cases 777, and many others. See also 11 R. C. L. 1016, (3) 12 *Id.* 668, etc.

*Brown & Anderson* and *Block & Kirsch*, for appellees.

1. The submerged lands were initially land and not lake-bed. 119 Ark. 331, 379; 77 *Id.* 338. They belong to appellee club.

2. The public has acquired no rights by prescription. 119 Ark. 383, 379, etc.; 75 N. E. 783; 148 Pac. 1073. The right to hunt and fish is a property right. 73 Ark. 235; 55 Atl. 656; 3 Am. St. 152, etc. To acquire a prescriptive right, there must be an open, definite continuous use, adverse to the owner for seven years. 47 Ark. 66; 79 *Id.* 5; 105 *Id.* 460. It must be proven. 61 *Id.* 464; 47 *Id.* 277; 76 *Id.* 538. Every finding of the chancellor is sustained by the evidence and should be affirmed.

WOOD, J. Horseshoe Lake, doubtless so named because of its shape, is a large body of water situated in Crittenden County, Arkansas. The Five Lakes Outing Club, of which appellees are the officers and trustees, is the owner of a large body of land within the peninsula of the lake, bordering on its inner rim. The inner bank of the lake is low and sloping, while the outer bank is high and clearly defined.

In 1905 the Levee Board of the St. Francis Levee District built a levee across the only outlet for the waters of the lake during times of high water and overflow. This levee caused the waters of the lake to extend and permanently submerge approximately one thousand acres of appellees' lands, whereby same have become a part of the bed of the lake. This area, being frequented by fish and wild fowl, is a favorite resort for hunting and fishing, and is therefore popularly known as "Happy Jack," is so designated in this record, and hereafter, for convenience, will be so called.

In 1911 the Outing Club attempted by siphon to lower the waters of Horseshoe Lake to their former level and thereby to restore Happy Jack to the condition that existed prior to the building of the levee, but the siphon was a failure, and the appellees now concede that the waters covering Happy Jack cannot be removed therefrom in any legitimate way. Appellees contend that prior to the building of the levee the highwater mark of Horseshoe Lake did not extend far enough to include Happy Jack and make it a part of the navigable waters of such lake; that they were therefore the owners of Happy Jack, and as such have the right to exclude the public therefrom for any and all purposes. They contend that the building of the levee in no manner affected their title and the rights incident thereto.

Appellees further contend that if it should be held that Happy Jack is a part of the bed of Horseshoe Lake, and that appellees have no right to fence the same and thus exclude the public from the use thereof for navigation, that they, nevertheless, as riparian owners, would

have the right to exclude the public from the use thereof for all other purposes, and that a court of equity should mold a remedy to protect this right. The appellant challenges these contentions, hence this suit.

The first question is, was Happy Jack, prior to the building of the levee, a part of the bed of Horseshoe Lake? This is a mixed issue of law and fact.

The testimony for the appellees tended to prove that as early as 1834 there was an official survey of the townships in which Happy Jack is located. The plats and field notes of that survey show that Happy Jack was surveyed as lands and sectionized and divided into the usual government sub-divisions; that Happy Jack, at that time, was covered with a growth of black thorn, cottonwood, maple and honey locust, and had an undergrowth of vines and briars; that this undergrowth extended up to the border of the lake as then meandered by the government surveys and was over all of Happy Jack; that Happy Jack was selected under the Swamp Land Grant and was sold to various parties from whom, through mesne conveyances, appellees deraigned their title; that they had been paying taxes on and claiming to have possession of Happy Jack ever since their purchase; that from July until the winter rains set in Happy Jack was dry and people rode and walked over the same.

The testimony for appellant tended to prove that prior to 1905, and during those years when there was no dam across the outlet for the waters of Horseshoe Lake, from about Christmas until July, Happy Jack was covered with water, and between July and Christmas the land, though dry on the surface, was boggy.

Maps and plats made by civil engineers and surveyors, and photographs made by competent photographers, were in evidence. The latter, however, were taken after the levee was built and since the litigation arose concerning Happy Jack. While they show Happy Jack from various angles as it appeared when these photographs were taken, they do not reveal the appearance of Happy Jack before that time.

(1) In *St. L., I. M. & S. Ry. Co. v. Ramsey*, 53 Ark. 314, we defined "high-water mark" and prescribed the test for ascertaining it as follows (quoting syllabus): "The high-water mark of a navigable stream, the line delimiting its bed from the banks, is to be found by ascertaining where the presence and action of water are so usual and long continued in ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation and the nature of the soil."

Applying the above to the testimony in this record, we hold that Happy Jack, prior to the building of the St. Francis Levee, was not a part of the bed of Horseshoe Lake. The character of the undergrowth and the nature and condition of the soil itself prior to that time were such as to give it a distinctive character as land rather than water. The high-water mark delimiting the line between the bed of the lake and its banks did not extend far enough out to embrace Happy Jack and thus render it a part of the bed of the lake. The title to Happy Jack at that time, therefore, was in the appellees and not in the State. Appellees at that time would have had the right, by delimiting and enclosing this territory, to exclude the public from access thereto for any and all purposes.

The next and only remaining question is, what effect, if any, did the building of the St. Francis Levee have upon the title of appellees and their rights as riparian proprietors? The facts concerning this are already stated; they are undisputed, and this issue therefore is purely one of law.

The State, as trustee for the public, has acquired title to Happy Jack by prescription. This is so because when the St. Francis Levee District, a governmental agency, built the levee such levee caused Happy Jack to become a part of the bed of Horseshoe Lake. This condition, notwithstanding the efforts put forth by appellees to counteract it, has already existed for more than seven years, and appellees admit must continue to exist for all

time to come. Under such circumstances the artificial level of the lake to high-water mark must be regarded as the natural level, and treated as such in determining the title and rights of riparian owners whose lands have thus been made a part of the permanent lake bed.

In *Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 91 Am. St. Rep. 898, 905, it is said: "True, also, if an artificial lake is created, or artificial level of a natural lake is caused by the erection of a dam, and such condition is allowed to exist adversely for the full statutory period necessary to change the ownership of the land affected thereby, the former owner thereof can not thereafter object to a continuance of such condition. By operation of the statute of limitations the artificial condition is thus stamped with the character of a natural condition, and the title to the lands covered by the waters or the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes."

It is held in the well considered cases of *Railway v. Ramsey*, *supra*, and *Barboro v. Boyle*, 119 Ark. 383, that the title to the bed of navigable waters in our State, that is, the title to the bed of such waters to high-water mark, is in the State. The character of such title is well expressed in the case of *Pewaukee v. Savoy*, 50 L. R. A. 836, 103 Wis. 271, as follows: "Upon the admission of the State into the Union the title to such lands, by operation of law, vested in it in trust to preserve to the people of the State forever the common rights of fishing and navigation and such other rights as are incident to public waters at common law, which trusteeship is inviolate, the State being powerless to change the situation by in any way abdicating its trust."

(2) When the waters of natural navigable lakes in this State are extended by artificial means so as to cause the land of riparian owners to be flooded, without their consent, and this condition is not merely temporary, but is continued for a sufficient length of time for the standing waters to produce a distinctive new high-water mark



for the waters of the lake bed, this gives the State, as the owner of such lake bed, the possession of the lands so covered to the high-water mark. Such possession is open, for a complete submergence of one's lands in this manner could not escape observation, and, if the owner is powerless to remove the cause and to restore the lands to their former condition, such possession is also adverse, and if it continues for seven years or more without interruption the State acquires the title to the lands so submerged, for, in such case, they have become a part of the natural lake bed. Such is the case here, and, as already observed, the State has acquired title by prescription or limitation. *Johnson v. Lewis*, 47 Ark. 66; *Clay v. Penzel*, 79 Ark. 5; *C. O. & G. R. R. Co. v. Rice*, 104 S. W. 819; *Medlock v. Owen*, 105 Ark. 460.

Learned counsel for appellees argue that since no one can acquire a right of hunting and fishing by prescription upon the unenclosed lands of another in this State, that, by analogy, neither can the State, for the use of the public, acquire such right by prescription on unenclosed submerged lands that have become a part of navigable lakes. But there is no analogy in such cases. Occasional or oft-repeated incursions upon the lands of another for the purpose of hunting and fishing does not signify any intention to appropriate the lands to one's own use. The act of hunting and fishing on the unenclosed lands of another is not an act of possession. It does not denote any purpose to hold the same adversely and thereby exclude the owner from dominion over his property, and it does not have any such effect. But if one should go upon the unenclosed lands of another without his consent and erect fences and construct artificial ponds for the propagation and preservation of wild game and fish, with a view of making the same his own game preserves, then all such acts would be a taking and holding adverse to the true owner, for that would deprive him of complete dominion over his property. The facts of this record are more analogous to the latter case, for here the inundation of the appellee's lands, under the circum-

stances, put the State in possession and as effectually foreclosed any private ownership and dominion in the appellees as if they had been barred therefrom by a stone wall or a wire fence. Of course, appellees, being still the owners of the lands bordering on the lake to high-water mark, would have certain riparian rights which other members of the public would not have, but which are not germane to this controversy. They would have the same common right of hunting and fishing in such waters as other members of the public would have.

(3) Appellees contend that even if it be conceded that Happy Jack is a part of the lake bed or permanent waters of Horseshoe Lake, and that if it be conceded that this fact would vest in the public an easement for the purpose of navigation in all of the navigable waters of Horseshoe Lake, that nevertheless the right of hunting and fishing on one's own lands is a private right which inheres in the ownership of the soil and is not in any manner incident to or dependent upon the public easement of navigation, and that they, as the record owners of the soil of Happy Jack, would have the exclusive right of hunting and fishing thereon so long as they exercised such right in a manner consistent with the public's right to use the waters for the purposes of navigation; that therefore they would have the right to enclose such parts of Happy Jack as were not in fact susceptible of navigation and to thereby exclude the public from the right of hunting and fishing within such enclosure. They further contend that, being the record owners of the soil, they have the exclusive right to hunt and fish on the waters of Happy Jack that are not in fact navigable, and that if it would interfere in any manner with the public right of navigation to enclose such waters, a court of equity should mold them a remedy by in some manner delimiting the navigable from the unnavigable portions of Happy Jack and granting them injunctive relief against encroachments upon the unnavigable portions. Appellees cite us to the case of *Schlute v. Warren*, 218 Ill. 108, 75 N. E. 783, which seems to sustain the appellees

in this contention. See also *Knudson et al. v. Hull et al.*, 148 Pac. 1070. But these contentions, we believe, are in conflict with the weight of authority and with the decisions of this court, which hold, under laws like ours, that the title in the soil in navigable waters below and to high-water mark is in the State in trust for the use of the public.

(4) The common right of hunting and fishing in such navigable waters is not reserved to the public as a right attached and incident to the right of navigation, but it is one that inheres in the public in our State because the State, in trust for the public, is the owner of the soil in navigable waters to high-water mark, and the common right of hunting and fishing is incident to such ownership, as well as the other common right of navigation. In our State these are independent rights, and both alike belong to the class of common rights which King John essayed to hold as private and individual, exclusive of the public, but which the Barons wrested from him, and which were vested by the Magna Charta in the Crown (the State) for the benefit of the public. These rights have come down to us from the common law and are reserved under our "Great Charter" to the States respectively to be held in trust for the benefit of the people. *Pollard's Lessee v. Hagan*, 3 Howard, 213. See *Lewis v. State*, 110 Ark. 204.

The State can neither alienate these rights nor abdicate the trust to hold and preserve them for the untrammelled use of the whole people of the State.

Therefore, since the appellees have no title to Happy Jack, there is no room for a court of equity to apply the maxim, "Where there is a right there is a remedy."

But counsel insist that this court held in *Barboro v. Boyle, supra*, that the title to Happy Jack was in appellees. Before and at the time of the building of the levee across the outlet to Horseshoe Lake the appellees were the owners of some 3,000 acres of lands, including Happy Jack, bordering on the inner rim of the lake. The Outing Club, through its trustees, instituted a suit, setting

up that Horseshoe Lake was non-navigable; that they were the owners of the lands that had been inundated by the waters of Horseshoe Lake by reason of the building of the levee to the center of such lake; that their efforts to siphon the same were of no avail, and that the overflowed condition was permanent, and they asserted that they had the exclusive right, as private owners, to hunt and fish on the lands covered by these waters to the center of the lake, and asked an injunction to exclude the public from hunting and fishing thereon. The plaintiffs in that suit are the appellees here, and the appellants, for the purposes of this suit, may be considered as the defendants to that. The defendants to that suit denied the rights asserted by the plaintiffs, and on appeal from a judgment of the chancery court in that case we held, briefly summarizing the opinion: that Horseshoe Lake was navigable; that the State was the owner of the lake bed to high-water mark; that "there was nothing on the banks adjacent to the plaintiffs' lands to indicate where the high-water mark is," and that an injunction should not issue because the lands of the plaintiffs (appellees here) were not enclosed. In the course of the opinion this language was used: "It may be said that the St. Francis Levee District was given the power to construct a levee, and, by the exercise of the right of eminent domain, to take whatever lands were necessary for that purpose. They did not acquire the lands of plaintiffs either by purchase or by the exercise of the right of eminent domain, and therefore plaintiffs had the right to pump the water out of the lake so that the waters might be restored to their former level, and thus prevent the flooding of their lands."

Appellees quote and rely upon the above language as *res adjudicata* of title in their favor. This language is correct. The State had not acquired the title to appellees' lands by purchase nor by condemnation. But it does not follow that the State does not have the title by prescription. If the appellees had succeeded within seven years after the building of the levee, in pumping

off the waters and restoring Horseshoe Lake to its former level, then the possession of the State to the lake bed would have been interrupted. But the futile efforts of appellees to siphon the lake did not interrupt or break the State's possession. Just following the above language the court continues: "When this right is conceded to plaintiffs, it is contended by their counsel that the chancery court erred in defining the limits of their lands upon which the defendants might hunt and fish. But we need not consider this question for the reason that we are of the opinion that the chancellor should not have issued any any injunction." And further on in the opinion the court used the following language: "The banks of the lake on the outer rim are steep, but the inside banks next to the lands of the plaintiffs are sloping. The land rises gradually, and it is difficult to tell where the high-water mark is on that side of the lake. As we have already seen, the title to the bed of the lake to high-water mark is in the State for the use of the public, and the public have a right to hunt and fish therein: There is nothing on the bank adjacent to plaintiffs' land to indicate where the high-water mark is; and, under these circumstances, we do not think the bank of the lake is sufficient indication of the ownership of the plaintiffs, taken in connection with the artificial barriers, to constitute an enclosure." We further said that the plaintiffs "have the exclusive right to hunt and fish on their own lands when they are enclosed."

It is manifest when the language of the opinion is taken as a whole, in connection with the issues there being discussed, the court did not hold that the title to "Happy Jack," the subject matter of this controversy, was in the appellees. On the contrary, the court expressly declined to consider that question; and therefore it is a misinterpretation of the opinion to construe it as foreclosing and settling the issue as to the title to Happy Jack, as presented by this appeal.

It follows that the court erred in dismissing appellant's complaint, and for this error the decree is reversed

and the cause is remanded with directions to enter a decree granting the appellant the relief prayed for.

McCULLOCH, C. J. (concurring). I concur in the conclusion reached by the court in this case and also approve, in the main, the general principles on which the decision is based, but it seems to be a misapplication of terms to say that the State acquired title to "Happy Jack" by prescription or by limitations. Neither is it correct, in my opinion, to say that the "futile efforts of appellees to siphon the lake did not interrupt the State's possession." We held in *Barboro v. Boyle*, 119 Ark. 377, that the owners of this land did not lose their title by reason of its inundation by artificial means and that they had the right to restore the land to its former condition by siphoning off the water so as to prevent the public from acquiring title by prescription. Such was, I think, the necessary effect of the language of the opinion in that case, and it is too narrow an interpretation of that language to say that it only meant that title was not acquired by purchase or by condemnation. If the owners had not then lost their title by prescription or limitation, they have not lost it now by those means. It has not been seven years since the owners abandoned their futile efforts to siphon the water off, and I think that the continued efforts of the owners to restore the land to its former condition prevented the public from acquiring title. As long as the owners continued those efforts the possession of the public was not hostile so as to put the statute of limitation in motion, but on the contrary, the public use was so far permissive as not to create a right by prescription.

But I think the decision reaching the result announced ought to be put on the ground that the owners have confessedly abandoned their effort to restore this land to its former condition, and that under those circumstances they cannot assert private rights in the land covered by navigable waters. The owners concede, in other words, that they cannot restore the *locus in quo* from navigable water to land and have abandoned their

efforts to do so; therefore, the rights of the public to the ownership as in navigable waters is established and the former rights of the original owners must be treated as abandoned rights. As long as the owners made reasonable efforts to restore the land, their rights were not lost by reason of the public use of the artificially created body of navigable waters, but when they abandoned those efforts the public rights began where theirs ended. They cannot assert private rights in a navigable body of water which cannot, the proof shows, be restored to its former status as land.

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JONES v. FLETCHER.

Opinion delivered January 14, 1918.

1. **DRAINAGE DISTRICTS—ORGANIZATION—SECOND PETITION—EXCLUSION OF CERTAIN LAND.**—Under the act of 1909, page 829, as amended by the act of 1911, page 193, the organization of a drainage district is not rendered invalid because a second petition was not filed, nor because in making the final order establishing the district the court excluded three sections of land embraced in the original petition.
2. **DRAINAGE DISTRICTS—ORGANIZATION—FINDINGS OF COUNTY JUDGE—PHRASEOLOGY.**—In the organization of a drainage district the court found that "it will be of great benefit to the land and other real property to have the said region drained; and that it will be of great benefit to the health of the inhabitants of said region; and that said work can be done at a reasonable cost, and will not exceed the benefits derived." *Held*, while this finding was not in the language of the statute, that it was tantamount to saying "the establishment of the district will be to the advantage of the owners of real property therein," and that the organization of the district was valid.
3. **DRAINAGE DISTRICTS—ORGANIZATION—COLLATERAL ATTACK.**—In a collateral attack upon the judgment of the county court establishing a drainage district, the plaintiff can not attack the district upon the ground that the proposed improvement was impracticable.
4. **IMPROVEMENT DISTRICTS—COST—INTEREST ON BONDS.**—The interest on the district's bonds is to be excluded from the original cost of the improvement.
5. **IMPROVEMENT DISTRICTS—INTEREST.**—In determining whether or not the cost of an improvement will exceed the assessed value of

benefits, it is proper to consider interest on the assessments. The right to collect interest is not lost by a failure to compute the interest in advance and add it, proportionately, to the installments of assessments.

Appeal from Lonoke Chancery Court; *J. E. Martineau*, Chancellor; affirmed.

*Wallace Townsend*, for appellants.

1. The proceedings under which the district was organized were void. The statute was not followed. Only one petition was filed and the court did not find that it was for the "best interest of the owners," etc. 106 Ark. 296, 300-1-4; 116 *Id.* 35.

2. No second petition was filed and three sections of land were omitted in the final order. 118 Ark. 119; 109 *Id.* 60.

3. The cost of improvement exceeds the benefits. 125 Ark. 422.

4. Certain lands were excluded although benefited. 125 Ark. 388; 121 *Id.* 13; 108 Ark. 141; 104 *Id.* 298; 122 *Id.* 491; 120 *Id.* 230. See also 64 Ark. 108-110; 123 *Id.* 205; 125 *Id.* 518-523; 192 S. W. 71; 120 Ark. 230.

*Geo. M. Chapline and W. P. Beard*, for appellees.

1. The petition and all proceedings necessary complied with the statute. No second petition was necessary. 93 Ark. 332.

2. The cost did not exceed the benefits. 122 Ark. 291.

3. There was no material variance from the improvement prayed. 120 Ark. 233. The court had jurisdiction and there was no appeal; the order was final and cannot be attacked collaterally. 121 Ark. 13; 50 Ill. App. 60; 5 Ark. 424; 8 *Id.* 268; 20 *Id.* 256; 14 *Id.* 125; 24 *Id.* 30; 44 *Id.* 56; 50 *Id.* 188; 118 *Id.* 449; 119 *Id.* 20. All irregularities were waived by failure to appeal.

The notice of the hearing on the assessment of benefits was sufficient. 103 Ark. 452.



McCULLOCH, C. J. This is an action instituted by appellant in the chancery court of Lonoke County against appellees as commissioners of Bayou Meto Drainage District No. 1, of Lonoke County, in which an attack is made on the validity of the organization of said drainage district and the assessments levied on the real property in the district to defray the cost of constructing the improvement. The cause was heard by the chancellor upon the pleadings and proof and a decree was entered dismissing the complaint for want of equity.

(1) The validity of the proceedings is attacked on numerous grounds. The two principal grounds for attack are that the order of the county court establishing the district was void because there was not filed a second petition as provided for in the statute, and because the court, in making the final order establishing the district, excluded three sections of land embraced in the original petition. These two attacks are so related that they may be discussed and disposed of together.

The statute provides that when "three or more owners of real property within a proposed district shall petition the county court to establish a drainage district to embrace their property, describing generally the region which it is intended shall be embraced within the district," and shall file a bond to pay the expense of survey, it shall be the duty of the county court to enter an order appointing an engineer who "shall forthwith proceed to make a survey and ascertain the limits of the region which would be benefited by the proposed system of drainage;" and after such engineer has filed his report, a notice shall be given by publication in a newspaper of the hearing by the court, and that at the time named "said county court shall meet and hear all property owners within the proposed district who wish to appear and advocate or resist the establishment of the district, and if it deems it to the best interest of the owners of real property within said district that the same shall become a drainage district, under the terms of this act, it shall make an order upon its records establishing

the same as a drainage district subject to all the terms and provisions of this act." Act of 1909, p. 829, as amended by act of April 28, 1911, p. 193.

Section 2 of the act of 1911, referred to above, reads in part as follows:

"If upon the hearing provided for in the foregoing section the petition is presented to the county court signed by a majority, either in numbers or in acreage or in value of the holders of real property within the proposed district, praying that the improvement be made, it shall be the duty of the county court to make the order establishing the district without further inquiry; but if no such petition is filed it shall be the duty of the county court to investigate as provided in the preceding section and to establish said district if it is of the opinion that the establishment thereof will be to the advantage of the owners of real property therein."

The method of procedure provided for in the statute is that after the report of the engineer has been filed and notice of the hearing given, a majority of the owners of property to be affected by the organization of the district may petition for the improvement, and it is made the duty of the county court to establish the district without further investigation when petitioned for by a majority "in numbers or in acreage or in value of the holders of real property within the proposed district;" but if there be no second petition, then the court is empowered to make the order establishing the district upon consideration of the original petition, when the court upon investigation finds "that the establishment thereof will be to the advantage of the owners of real property" in the district. It is not essential, therefore, that there be a second petition. *Burton v. Chicago Mill & Lumber Co.*, 106 Ark. 296. Nor does the statute confine the power of the court in establishing the district to the boundaries stated in the original petition. The statute, it will be observed, only requires that the original petition shall describe "generally the region which it is intended shall be embraced within the district," and further provides that the engi-

neer appointed by the court shall "make a survey and ascertain the limits of the region which would be benefited by the proposed system of drainage." Section 7 of the act of 1909 expressly provides for the addition of other lands to the district subsequently found by the board of commissioners to be benefited by the proposed improvement. It is clear, therefore, from the language of the statute that the final boundaries of the district are to be determined by the court and not confined to the area described in the original petition, as the survey which is made subsequent to the filing of the original petition necessarily serves as a guide to the court in determining what property will be affected by the improvement. We are of the opinion, therefore, that neither of the two grounds stated for the attacks upon the proceedings are tenable.

(2) It is insisted, however, that the findings of the county court, as recited in the order establishing the district, do not sufficiently comply with the statute to justify the creation of the district, in that the court did not find, as provided in the statute, that the establishment of the district "will be to the advantage of the owners of real property therein," but merely found that the organization of the district "will be of great benefit to the lands and other real property to have said region drained." Counsel rely on the decision in *Burton v. Chicago Mill & Lumber Co. supra*, as sustaining the contention of appellants, but we do not think that the questions involved in the two cases are similar. In the case just cited we had for consideration the question whether or not the order of the court refusing to establish the district was inconsistent with the findings that "it would be to the best interest of the owners of real property within the proposed district that the land therein be drained." We held that the order was not inconsistent with the findings and affirmed the judgment of the circuit court. In the present case, however, we have the question whether the order is void for the reason that the finding of the court is not in the language of the statute. We think that the re-

citals of the finding tends to support the judgment of the court in creating the district. The finding was not, it is true, recited in the precise language of the statute, but it is substantially so. The court found according to the recital that "it will be of great benefit to the land and other real property to have said region drained; and that it will be of great benefit to the health of the inhabitants of said region; and that said work can be done at a reasonable cost, and will not exceed the benefits derived." That is tantamount to saying that "the establishment of the district will be to the advantage of the owners of real property therein," and supports, rather than defeats, the judgment of the court creating the district.

(3) It is next contended that the scheme for the proposed improvement is impracticable, and that for that reason the district ought not to have been established. But the answer to that contention is that the present action constitutes a collateral attack upon the judgment of the county court establishing the district, and that judgment is not open to such an attack, the presumption being that the county court acted upon evidence sufficient to warrant the finding that the establishment of the district and the construction of the improvement thereunder would result "to the advantage of the owners of real property" within the meaning of the statute. *Jacks Bayou Drainage Dist. v. St. L., I. M. & S. Ry. Co.*, 116 Ark. 30.

(4) It is also alleged that the cost of the improvement will exceed the benefits, but this contention is based upon the inclusion of interest on the bonds as a part of the cost of the improvement, and this court has already decided that under the statute the land owners are required to pay the interest on deferred payments of assessments to meet the interest on the bonds issued to pay for the improvement, which results in substance in excluding the interest on the bonds from the original cost of the improvement. *Oliver v. Whittaker*, 122 Ark. 291.

(5) It is urged that interest on assessments can not be considered for the reason that the order of the county court approving the assessments does not show that interest was computed and added, proportionately, to the assessments.

We held in *Oliver v. Whittaker, supra*, that the statute authorized the computation of interest in advance and its inclusion in the assessments but we did not say that it must be done in that way. Such a view would, we think, disregard the plain language of the statute which provides that "deferred instalments of the assessed benefits shall bear interest at 6 per cent. per annum," and that "interest need not be calculated until it is necessary to do so to avoid exceeding the total amount of benefits and interest."

The framers of the statute evidently had in mind possible cases where it would be uncertain, at the time of the assessment of benefits, whether or not the cost of the improvement and the interest on bonds would exceed the value of benefits exclusive of interest and they meant to confer authority to leave the computation and collection of interest open until it became necessary to collect interest in order to "avoid exceeding the total amount of benefits and interest."

Land owners have the right to pay off the face of the assessments, without interest, within 30 days after the assessments become final but if the option to do so is not exercised, then the statute itself imposes interest to be computed when necessary "to avoid exceeding the total amount of benefits and interest." The right to collect interest has not, however, been lost by failure to compute the interest in advance and add it, proportionately to the instalments of assessments, therefore it is proper to consider interest on assessments in determining whether or not the cost of the improvement will exceed the assessed value of benefits.

Our conclusion upon the whole case is that the several attacks made upon the validity of the district are unfounded, and that the chancellor was correct in dismissing the complaint. Affirmed.

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DES ARC OIL MILL v. WESTERN UNION TELEGRAPH  
COMPANY.

Opinion delivered January 28, 1918.

1. TELEGRAPH COMPANIES—NEGLIGENT SENDING OF MESSAGE—DUTY OF SENDER TO MINIMIZE DAMAGES.—It is the duty of one suffering damage by reason of the negligence of a telegraph company to adopt every available method of minimizing the damage, yet this rule does not require the sender to break his own contract in order to protect the telegraph company from the consequences of the negligence of its own servants.
2. CONTRACT—CONTRACT MADE BY TELEGRAPH—RESPONSIBILITY OF SENDER WHO IS THE OFFERER.—A party making an offer by telegraph is responsible for the correct transmission of his message and is bound by it in the terms in which it is delivered to the party addressed.
3. CONTRACTS—CONTRACT BY TELEGRAPH—TELEGRAPH COMPANY IS AGENT FOR WHOM—BOTH SENDER AND SENDEE MAY SUE FOR DAMAGES.—As between the sender and the sendee the telegraph company is the agent of the former, who is bound by any mistake made in the transmission of a message, though the sendee may, under proper circumstances, maintain an action against the telegraph company for damages resulting in violation of the public duty, which it owes as a carrier, to the sendee as well as to the sender.
4. CARRIERS—CONTRACT EXEMPTING FROM LIABILITY—TELEGRAPH COMPANY.—A public carrier's contract exempting itself from liability for negligence of its own servants is void. A stipulation in the contract of a telegraph company that it will not be liable for damages resulting from the incorrect transmission of an un-repeated message is void.
5. TELEGRAPH COMPANIES—SENDING MESSAGE—STIPULATION AGAINST LIABILITY FOR NEGLIGENCE—INTERSTATE COMMERCE.—It is no interference with interstate commerce for the courts of this State to declare the law, that a stipulation by a public carrier, attempting to exempt itself from liability for negligence, is void.

Appeal from Pulaski Circuit Court, Third Division;  
*G. W. Hendricks*, Judge; reversed.

*Richard M. Mann*, for appellant.

1. The appellee is liable on the first cause of action for its negligence. It introduced no testimony whatever, nor did it introduce any provision limiting its liability, nor any testimony that it had filed with the Interstate Commerce Commission any rules or regulations limiting its liability. This was an essential showing as a defense. 223 U. S. 573; 191 S. W. 817. If a provision limiting liability had been shown it was not valid nor binding. 38 U. S. Stat. L. 1196, Fed. Stat. Ann. Suppl. 1916, p. 124; 196 S. W. 516; 191 *Id.* 817.

2. It was liable for negligently and falsely assuring appellant that the message was correctly delivered, on which assurance appellant relied to its damage. 103 Ark. 79; 25 *Id.* 219; 37 *Id.* 47; 29 *Id.* 512; 16 Cyc. 1003; 25 *Id.* 425, note 526; 111 N. W. 1; 8 L. R. A. (N. S.) 485; 50 L. R. A. 160; 75 Ark. 596; 17 Fed. 495; 117 Iowa 180; 90 N. W. 616; 62 L. R. A. 617.

3. The telegraph company was the agent of the sender and bound to correctly transmit the message. 9 Cyc. 294. See also 153 N. W. 375; 84 Ark. 457; 92 *Id.* 133; 73 *Id.* 205; 89 *Id.* 368.

*Albert T. Benedict and Rose, Hemingway, Cantrell, Loughborough & Miles*, for appellee.

1. The instruction is sustained by the conditions of the telegram. 154 U. S. 1.

2. The conditions limiting liability are authorized by the Interstate Commerce Act. 36 Stat. L. 539; 231 Fed. 405; 165 Pac. 1175; 89 S. E. 106; L. R. A. 1915 B. 685; 203 Fed. 140.

3. If plaintiff sustained a loss, it alone was to blame. 1 Sedgwick on Dam., § 201 *et seq.*; 57 Ark. 257; 264; 73 *Id.* 205; 118 *Id.* 113; 62 S. W. 119; 86 S. E. 631; 141 Pac. 585; 160 S. W. 991; 141 Pac. 586.

4. There was no later contract between the parties. 154 W. S. 128. The conditions were part of the contract and put plaintiff on notice. Plaintiff could have sold without loss. The undertaking of the agents of defend-

ant was wholly without consideration. The company is a public servant and required to conduct its business under the rules of the Interstate Commerce Commission and no discrimination nor guarantee could be allowed.

MCCULLOCH, C. J. This is an action instituted by appellant against appellee telegraph company to recover damages for alleged negligence of appellee's servants in failing to correctly transmit and deliver a telegraphic message. Appellee did not introduce any testimony concerning the transaction and appellant's testimony is undisputed. The trial court decided that no liability on the part of the telegraph company was shown and gave a peremptory instruction to the jury to return a verdict in appellee's favor.

Appellant operated an oil mill in Arkansas and maintained an office in the city of Little Rock. On October 27, 1916, appellant held an option from another mill concern at Searcy, Arkansas, for the purchase of 1,000 tons of cotton seed, and on that day sent a code message by telegraph to the East St. Louis Cotton Oil Company of East St. Louis, Illinois, offering to sell 850 tons of seed at the price of \$64.00 per ton, the word "completely" being used in the code to indicate those figures. In the transmission of the message the word "completely" was used by the operator, which, according to the interpretation of the code, indicated the price of \$63.00 per ton for the seed, and the message was delivered to the sendee in that form. Immediately upon the receipt of the message the manager of the East St. Louis mill called up appellant's agents at Little Rock by telephone and accepted the offer without either of the parties restating the price, appellant's agent understanding at the time that his message had been correctly transmitted indicating the price of \$64.00 per ton, and the manager of the other concern supposing at the time that he received the message correctly and that the price was \$63.00 per ton as indicated by the code word used in the message. There was a custom among dealers in the commodity mentioned to confirm



trades made over the telephone, by telegram or letter, and so, within an hour after the telephone conversation, the manager of the East St. Louis mill sent to appellant's manager a telegram confirming the acceptance of the order at \$63.00 per ton. As soon as appellant's manager observed this discrepancy between the offer and that contained in the acceptance he instituted an inquiry with the telegraph company and after due investigation by the operator the manager reported to appellant's manager that the message had been correctly transmitted and delivered as written. Resting upon this assurance appellant's manager insisted upon the purchaser taking the seed at the price contained in the offer, but when he ascertained finally that the message had been incorrectly transmitted and that in the form delivered to the purchaser the price was indicated at \$63.00 per ton he yielded to the contention of the purchaser and delivered the seed at that price. The difference of \$1.00 per ton is claimed as damages resulting from the incorrect transmission of the message. Cotton seed was worth in the market the full price stated in appellant's offer for several days after the offer was made, but subsequently declined in price. Immediately after the telephone message between appellant's manager and the East St. Louis purchaser appellant closed the option with the Searcy mill for the purchase of 1,000 tons of seed. The evidence shows that, although the telegraphic message sent by appellant was in code language and unintelligible to those who were not familiar with the code, appellant's manager informed the operator of the contents and importance of the message.

(1-3) The first contention of learned counsel for appellee in support of the court's peremptory charge to the jury is that the damage to appellant was avoidable in that its manager was apprised of a mistake in the transmission of the message in time to have sold the cotton seed at the full price named therein and appellant should have broken its contract with the purchaser and sold the seed for the best obtainable price which was sufficient to

cover the damages resulting from the breach of the contract. This reasoning is, we think, entirely unsound. While we have announced the rule in this class of cases that it is the duty of one suffering damage by reason of the negligence of a telegraph company to adopt every available method of minimizing the damage (*Western Union Tel. Co. v. Crain*, 118 Ark. 13), yet this rule does not require a party to break his own contract in order to protect the telegraph company from the consequences of the negligence of its own servants. The rule stated does not go that far. It is conceded that the servants of the telegraph company were guilty of negligence and that as a result of that negligence a valid contract was imposed on appellant to sell the seed at a lower price than was proposed in the message as written and delivered to the agent of the telegraph company for transmission. The authorities announce the rule that "a party making an offer by telegraph is responsible for the correct transmission of his message and is bound by it in the terms in which it is delivered to the party addressed." This is on the theory that the carrier of the message is the agent of the sender. 9 Cyc., p. 294; *Ayer v. Telegraph Co.*, 79 Me. 493; *West. Union Telegraph Co. v. Shotter*, 71 Ga. 760; *Durkee v. Vermont Central Rd. Co.*, 29 Vt. 127; *Saveland v. Green*, 40 Wis. 431; *New York & W. P. Telegraph Co. v. Dryburg*, 35 Pa. St. 298; *Shererd v. Telegraph Co.*, 146 Wis. 197; *Younger v. Telegraph Co.*, 146 Iowa 499; *Eureka Cotton Mills v. Telegraph Co.*, 88 S. C. 498. There are decisions to the contrary. *McKee v. Telegraph Co.*, 158 Ky. 143, 51 L. R. A. (N. S.) 439; *Shingleur v. Telegraph Co.*, 72 Miss. 1030; *Pepper v. Telegraph Co.*, 87 Tenn. 554. The true rule is, we think, that announced in the majority of the cases that as between the sender and sendee the telegraph company is the agent of the former who is bound by any mistake made in transmission of a message, though the sendee may, under proper circumstances, maintain an action against the telegraph company for damages resulting in

violation of the public duty, which it owes as a carrier to the sendee as well as to the sender.

The offer contained in the telegram was accepted by the purchaser in a telephone message and later was confirmed in a telgraph message sent in accordance with the custom of that trade. The message was strictly one in confirmation of the acceptance of the price contained in appellant's offer and was not a counter-proposition for purchase at a different price.

It is next contended that there was no liability because the printed telegraph blank contained stipulations exempting the company from liability. Those stipulations read as follows:

“To guard against mistakes or delays, the sender of a telegram should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated telegram and paid for as such, in consideration whereof it is agreed between the sender of the telegram and this company as follows:

1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery of any repeated telegram, beyond fifty times the sum received for sending same, unless specially valued; nor in any case for delays arising from unavoidable interruptions in the working of its lines; nor for errors in cipher or obscure telegrams.

2. In any event the company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, at an additional

sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof."

(4) The stipulation in question constitutes an attempt on the part of the telegraph company to exempt itself from liability for damages resulting from the negligence of its own servants. According to the very great weight of authority such a provision in the contract of a public carrier is void, and this is true as to the particular stipulation before us concerning repeated and unrepeatd messages. Jones on Telegraph & Telephone Companies, § 377. It was so held in the case of *Western Union Telegraph Co. v. Short*, 53 Ark. 434, and the same rule was announced in the case of *Western Union Telegraph Co. v. Compton*, 114 Ark. 193, except that the stipulation dealt with in that case was not the one concerning unrepeatd messages. The syllabus in that case erroneously states the contrary rule, but the opinion shows clearly the holding of the court following the rule announced in the *Short* case, *supra*, that such stipulation is void. We granted a rehearing in the *Compton* case on the ground that the Supreme Court of the United States had decided that the imposition by the State statute of liability for mental anguish was an interference with interstate commerce. *Western Union Tel. Co. v. Brown*, 234 U. S. 542. The effect of the original opinion that the contract for exemption from liability for negligence is void was not modified in the opinion on rehearing. We allowed the judgment to stand for the sum of \$50, the sum named in the stipulation merely for the reason that that was the extent of defendant's defense as it had offered in the pleadings to pay damages in that sum. The opinion on rehearing did not deal with the question of exemption from negligence, but was based entirely upon the decision of the Supreme Court of the United States that the State statute was inapplicable to an interstate message. The effect of the *Compton* case has been misinterpreted in other quarters. *Gardner v. West. Union Tel. Co.*, 231 Fed. 405; *West. Union Tel. Co. v. Bailey*, 184 S. W. 519; *West. Union Tel. Co. v. Bailey*, 196 S. W. 516; *West. Union Tel. Co. v. Bank*

of *Spencer*, 156 Pac. (Okla.) 1175. But an examination of the opinion shows clearly that the court meant to array itself, as it had already done, with those courts that had steadily adhered to the rule that a public carrier's contract exempting itself from liability for negligence of its own servants is void. Other cases decided later by this court merely followed the *Compton* case in yielding to what we conceived to be the ruling of the Supreme Court of the United States in the case of *Western Union Tel. Co. v. Brown*, *supra*. *Western Union Tel. Co. v. Holder*, 117 Ark. 210; *Western Union Tel. Co. v. Johnson*, 115 Ark. 564.

There are certain expressions in the opinion in the *Holder* case, *supra*, which might be interpreted to mean that this court intended to recede from its position on the question of invalidity of a contract exempting a carrier from liability for negligence, but the language must be read in the light of the particular question under consideration, and when so understood it is clear that we only meant to yield to the superior authority of the Supreme Court of the United States in holding that the statute imposing liability for mental anguish is a burden on interstate commerce.

(5) Is such a stipulation rendered valid by the statute enacted by Congress in the year 1910 (act of June 18, 1910, 36 Stat. L. 544, Fed. Stat. Ann. Supp. 1912, vol. 1, p. 112), giving the Interstate Commerce Commission authority to regulate rates and practices of telegraph companies? We discover no good reason for holding that such a contract, if void under the general principles of the common law prior to the enactment of that statute, has become valid under the statute. The controlling clause of the statute in question reads as follows:

“All charges made for any service rendered or to be rendered in the transportation of passengers or property or for the transmission of messages by telegraph, telephone or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is

prohibited and declared to be unlawful; provided, that messages by telegraph, telephone or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeatd, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

It was clearly the intention of Congress in enacting this statute to confer authority on the commission merely to regulate rates and classifications of messages, and not to confer authority to declare the principles of law affecting the liability of a carrier for its wrongful acts or omissions. *Western Union Tel. Co. v. Bailey, supra*. The classification of repeated and unrepeatd messages and the fixing of rates for the different classes of messages is quite a different thing from a contract absolving the carrier from liability for its own negligence. If it had been intended to confer power upon the Interstate Commerce Commission to change the law in that respect by the mere approval of classification of rates, doubtless the framers of the statute would have used different language. The Supreme Court of the United States has given a very clear intimation that no such power is conferred by the various statutes with reference to the regulation of interstate rates by the commission. In *Adams Express Co. v. Croninger*, 226 U. S. 491, the court said:

"That a common carrier can not exempt himself from liability for his own negligence or that of his servants is elementary. *York Mfg. Co. v. Illinois Central Rd. Co.*, 3 Wall. 107; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 338. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper

which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported."

Similar language was used by the same court in the later case of *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, which was a case which went up on a writ of error from this court. 91 Ark. 97. In that case the court said: "Is the contract here involved one for exemption from liability for negligence and therefore forbidden? An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration." In each of those cases, however, the court upheld the stipulation as a special contract as to the value of the commodity shipped. The stipulation with respect to the telegraph message can not be sustained as a stipulation for value because in the very nature of the case a telegram or the damages which may flow from its breach can not be estimated in advance. *Western Union Tel. Co. v. Compton, supra*. Nor can adherence to the common law principle which invalidated such a stipulation be viewed as a burden upon or interference with interstate commerce, or as being in conflict with the authority of the Interstate Commerce Commission over that subject, for, as before stated, the exemption does not come within the scope of the regulation of rates or of classification of messages, but is purely an attempt to contract against the general law of the land with respect to liability for negligence.

Learned counsel for appellee press upon our attention the recent case of *Gardner v. Western Union Tel. Co.*, 231 Fed. 405, decided by the United States Circuit Court of Appeals for the Eighth Circuit, as sustaining their contention that, such a stipulation is rendered valid by the

act of Congress assuming jurisdiction over the regulation of telegraph companies. We do not think that the decision in that case has any such bearing on the present case. That decision dealt entirely with the stipulation providing that there should be no liability unless notice should be given within sixty days—a provision the validity of which has been frequently upheld by this court, and is valid according to the weight of authority. A clause in the Oklahoma constitution attempted to render void such a provision in any contract or agreement, and the question before the court in that case was whether or not the provision of the Oklahoma constitution in its application to an interstate carrier was an attempted interference with interstate commerce, and the Court of Appeals held that it was. We fail to see the application of that decision to the question now before us. Many other cases cited on the brief of counsel held, as we did, that the right to recover mental anguish under local statutes and decisions has been abrogated by the assumption of power by Congress over the subject of interstate carriers of messages. The only decision by a court of last resort brought to our attention holding that the Interstate Commerce Commission has, under the Federal statute, the power to approve and legalize a regulation exempting a telegraph company from its own negligence is the case of *Haskell Implement & Seed Co. v. Postal Telegraph Co.*, 114 Me. 277, 96 Atl. 219. Some of the decisions cited seem to confuse this question with the right to recover mental anguish under local statutes, but the two questions are different, as we have attempted to show. At any rate, we are convinced that it is no interference with interstate commerce for the courts of this State to adhere to its former decisions in declaring the general law on the subject that a stipulation of a public carrier attempting to exempt itself from liability for negligence is void. That conclusion is in entire accord with the views expressed in our former decisions, and we now adhere to them.

It follows, therefore, that the circuit court erred in holding the stipulation to be valid and in giving a per-



emptory instruction to the jury in appellee's favor. Reversed and remanded for a new trial.

SMITH, J., (dissenting). No useful purpose would be served by reviewing the cases cited in the majority opinion, or the briefs of counsel, and this dissent is written chiefly to express my regret that I can not assent to the view of the majority.

The stipulations printed on the back of the telegraph blank are set out in the majority opinion; and in the briefs it is said that these stipulations have been in use, with only inconsequential changes, since telegraphy, as an aid to commerce, was in its infancy. From the beginning courts have differed as to the validity of these stipulations. They were upheld by the Supreme Court of the United States in the case of *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, and a number of courts concurred in that view. But this court, with others, and, perhaps, the larger number, took the opposite view. In the case of *Western Union Telegraph Co. v. Short*, 53 Ark. 434, this court refused to give effect to the limitations of liability there contained, upon the ground that they were stipulations for immunity from liability for negligence in the transmission of a message—an unrepeatable message there, as here. The majority now assign here the same reason which was assigned there for refusing to give effect to the stipulations above referred to.

But the perspective has changed since the decision of this court in the *Short* case, *supra*. Since the passage of the act of Congress of June 18, 1910, referred to in the majority opinion, telegraph companies are given the right to classify their messages and to make a charge dependent upon the classification to which the message belongs. The subject is one of which the Federal Government has exclusive control, when it elects to exercise that control, and we can not refuse to give effect to any classification approved by the Interstate Commerce Commission—the agency constituted by Congress to pass upon the classification of messages—by saying that a classification which has been approved is void as a contract against liability

for negligence. The power of review is, in the last analysis, the power of control, and, if we are to give effect only to such regulations or classifications as meet our approval, then we—ourselves—and not the Interstate Commerce Commission, have the right of approval, and it can not be material upon what ground we give or withhold our approval. Other courts would have an equal right to approve or disapprove, and the same contrariety of views would, no doubt, then be found as did in fact exist before Congress delegated to the Interstate Commerce Commission the duty of classifying messages. There can be no doubt but that the desire for uniformity was one of the controlling purposes moving Congress to take control of interstate telegraph and telephone messages and in delegating to an agency already existing, and which had been created for the purpose of regulating other forms of commerce between the States, the right to approve the classification of such messages. This purpose of uniformity is at once defeated if the courts of the various States may decide which, if any, of such regulations shall be enforced when they are called upon to enforce them.

A case which appears to me to be decisive of the point at issue is that of *Cultra v. Western Union Telegraph Co.* This case is reported in volume 44 of the Reports of the Interstate Commerce Commission at page 670. It was submitted to the commission on April 12, 1917, and decided on May 17, 1917. That case originated in the circuit court of Jackson County in the State of Missouri, and was brought to recover damages sustained through the erroneous transmission of an unrepeated message. The case is not distinguishable from the case at bar on the facts. The opinion of the commission reflects the fact that the trial court held the case in abeyance pending a ruling by the commission upon the validity of the stipulations above referred to; and the opinion also reflects the fact that the commission treated the case as one of first impression with it and as one of the highest importance. The opinion puts the question at rest, insofar

as it is in the power of the commission to do, and concludes with the following statement:

“Our conclusion upon the record is that the Congress, by the language used in the amendatory act of 1910, has manifested a definite intention to place under the jurisdiction and control of this commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeatd rate to which was lawfully attached, as a fundamental feature of it, the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy, but on the contrary are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful. The complaint must therefore be dismissed, and it will be so ordered.”

The facts of the instant case may be summarized as follows: Appellant was offered the choice of three classifications under which to send its message, and the choice made governed both the rate to be charged for the service and the liability of the telegraph company for mistakes or delays in the transmission or delivery of the message. Both the charge to the sender and the liability of the company depended upon the classification selected by the sender for this message, and it was the sender's right and privilege to select the classification to which its message should be assigned. The message could have been sent as a repeated one, or as an unrepeatd message, or it could have been sent as a valued message by paying one-tenth of one per cent. of the value assigned.

In the opinion of the Interstate Commerce Commission cited it is stated that the basis of any charge made by the telegraph company is that of an unrepeatd message.

and it is pointed out that the right to classify messages and to base the charge upon the classification made is wholly nullified, if the rate charged and collected for an unrepeated message carries with it the same protection to the sender, or recipient, and imposes upon the telegraph company the same liability and degree of care as a repeated or a valued message. No one would pay the higher rate, if he were entitled to the same service at the lower rate.

So that, whatever we may think of the merit of the classifications, or of the possible results from their approval, by the Interstate Commerce Commission, it is our duty to give effect to the ruling of that commission, and it is likewise our duty to give effect to the numerous recent decisions of the Supreme Court of the United States, which hold that carriers may graduate their charges according to the value of the service performed. The doctrine of those cases is applicable here.

In my view, therefore, the appellant should have judgment for the sum tendered by the telegraph company, which sum is based upon liability for the negligent transmission of an unrepeated message.

I am authorized to say that Mr. Justice Wood concurs in the views here expressed.

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### SNELL v. WHITE.

Opinion delivered January 28, 1918.

1. **DEED—DEED AS MORTGAGE.**—A conveyance absolute in form is presumed to be a deed, and, to overcome this presumption, in the absence of fraud, the evidence must be clear, unequivocal and convincing.
2. **DEEDS—DEED AS MORTGAGE—FINDING OF CHANCELLOR.**—Certain land was deeded by appellant and her husband to appellee, appellee then giving them back a contract of resale, appellee and her husband executing four promissory notes therefor. These notes were never paid. *Held*, the finding of the chancellor that this transaction was not intended as a mortgage from appellant to appellee would not be disturbed on appeal.

Appeal from Columbia Chancery Court; *James M. Barker*, Chancellor; affirmed.

*Joe Joiner* and *A. S. Kilgore*, for appellant.

1. The intention of the parties must govern as to whether the instrument was a deed or mortgage. 27 Cyc. 1007; 3 Pom. Eq. 1195; 103 Ark. 493; 46 *Id.* 129; 88 *Id.* 369.

2. The instrument was a mortgage to secure a loan, and such was the intention of the parties. There was a debt to be secured. 128 Ark. 67; Jones on Mortg., § 266; Devlin on Deeds, § 1118. See also 106 Mo. 278; 27 Cyc. 972; 3 Pom. Eq. 1195; 117 Ark. 388; 117 U. S. 681; 1 How. 118; 71 Col. 412; 85 Ill. App. 487; 132 N. Y. 531; 27 Cyc. 1014; 3 Pom. Eq. 1015; 21 W. Va. 415; 22 Fla. 654; 88 Ark. 299; 134 N. C. 596; 106 Mo. 278; 88 Ark. 337; 105 *Id.* 314; 75 *Id.* 551; 117 *Id.* 388; 38 *Id.* 207; 105 *Id.* 314; 75 *Id.* 551; 58 Ore. 98.

*McKay & Smith*, for appellees.

1. The deed conveyed the property absolutely and is not a mortgage, nor so intended. 75 Ark. 557; 1 Jones on Mort., par. 265; 88 Ark. 299, etc.

2. Appellant is estopped. 89 Ark. 349; 33 *Id.* 445; 91 *Id.* 148; 55 *Id.* 296; 24 *Id.* 401; 188 S. W. 571; 125 Ark. 146.

3. She is barred by laches. 10 R. C. L. 400; 74 Ark. 520; 55 *Id.* 85; 3 Bro. C. C. 640; 110 Ark. 24; 182 S. W. 272; 121 Ark. 617.

4. The findings of a chancellor will not be disturbed unless contrary to the clear preponderance of the evidence. 195 S. W. 674; 84 Ark. 429; 92 *Id.* 359; 129 Ark. 301.

*Stevens & Stevens*, for appellee White.

It was an absolute deed and so intended. No fraud is shown. 37 Ark. 146; 92 *Id.* 509; 75 *Id.* 554; 87 *Id.* 593; 88 *Id.* 299; 19 *Id.* 278; 31 *Id.* 163; 40 *Id.* 146; 80 *Id.* 543; 99 *Id.* 260, etc.

## STATEMENT OF FACTS.

George Ann Snell instituted this suit in the chancery court against B. W. White and L. H. Pearce, and asked that the deed executed by her to Pearce for 120 acres of land be declared a mortgage, that the mortgage be declared satisfied and that her title to said lands be confirmed and quieted and that she have damages for the unlawful cutting of certain timber upon said lands.

The answer of the defendants contained a general denial of the allegations of the complaint, and the defendants asserted title in themselves by virtue of the deed to Pearce from George Ann Snell.

George Ann Snell testified for herself substantially as follows:

I am the owner of the land in controversy, being 120 acres situated near Calhoun in Columbia County, Arkansas. My children and I worked and paid for the land. My husband gave the mortgage on part of my land to John Wyrick to secure a debt of his own. In February, 1906, I executed a mortgage to L. H. Pearce on forty acres of my land in consideration that he pay the debt of my husband secured by the former mortgage. Mr. Pearce told me that the instrument that I executed in his favor was a mortgage. He owned lands near mine, and in going to his property frequently he stopped at our house. He always told me that he did not want the land but that all he wanted was the payment of his debt. Later on B. A. White came to me and told me that I never could pay the place out as long as Pearce had hold of it. He suggested that he would pay it out and then we would fix matters up so that I could pay him. We did not enter into any agreement but he bought a part of the land from Pearce anyway. When we heard of this, we sent for him to come to our house. White said he was out \$1,000 and that we could have the land for that amount. After that he just came on the land and began to cut the timber. On cross-examination she stated that she could not read nor write, that she well remembered the day Pearce told her

that she had executed a mortgage on the land and stated that Pearce did not enter into a contract with her husband on that day to convey the land back to him for the sum of \$506. On redirect examination she stated that she had cleared three acres on the land and had torn down the old house and moved it to another place on the land; that she rebuilt the house with the old lumber and some new lumber; that Pearce never did say anything about renting the place to her and never did make a contract about renting it to her. Her testimony was corroborated by that of her husband.

Her two daughters testified that Pearce used to come to their place and look into the barn, kitchen and other places for things; that he would eat dinner there sometimes and often told their mother that all he wanted was his money and that he did not want their place.

L. H. Pearce testified substantially as follows: At the request of John Snell I took up a mortgage that he and his wife had executed to J. C. Wyrick. I think I paid \$180 for them. I also paid off a mortgage for them to E. E. Henry for \$100. On the 13th day of February, 1906, John Snell and George Ann Snell, his wife, executed a deed to me to fifty-two acres of land in which the consideration recited in the deed was \$300. This consideration represented the mortgages I have paid off for them and maybe a little money that I furnished them. Forty acres of this land belonged to George Ann Snell and the remaining twelve acres to her husband. I did not know at the time that she owned any of the land. On the same day I executed a written contract agreeing for a resale of this land together with other lands near there to John Snell for the sum of \$506, payable in four payments due respectively the first day of October, 1906, 1907, 1908 and 1909. That contract was on a written form and provided that time was the essence of the contract and that upon the failure of Snell to make any of the payments at the time specified that the contract on that date should be null and void, and that all the rights and interest in the premises should terminate; that thereafter Snell should

pay rent at the rate of \$100 per year. On December 8, 1906, John Snell and George Ann Snell executed a deed to L. H. Pearce for eighty acres of land. George Ann Snell relinquished dower in this deed just as she did in the deed dated February 13, 1906. On December 14, 1906, George Ann Snell executed a warranty deed to me for the 120 acres of land owned by her. The consideration recited in this deed was \$250. It was filed for record on November 1, 1916. At this time I executed a written contract with John Snell to resell land to me. It was on the same printed form as the other contract. It was executed in the place of the former contract. Afterwards Snell failed to make the payments as required by the contract and his contract was declared forfeited. After that the Snells began to pay rent to me. I also furnished them. They failed to pay the amounts they owed me, and after a few years I turned them over to White. I agreed that I would take one-fourth of the cotton raised by them for rent and would waive my landlord's lien except for that amount. This agreement went into effect in 1910, and from then on White furnished them and they paid me one-fourth of the cotton as rent. They never made any of the payments on the place, and, as above stated, did not even pay me the amount due me for rent and for supplies furnished them. I had lost the second contract for the sale of the land entered into with Snell. I made no effort to keep either one of the contracts for the reason that they were forfeited years ago. I just happened to find the first contract among some old papers and exhibited it in evidence.

B. A. White testified substantially as follows: I have known John and George Ann Snell for seventeen years, and lived about a mile from them. I am a merchant and farmer. I first furnished them several years ago. Then they wanted some money and Pearce let them have it and took a deed to their land. He furnished them for two or three years and then they came back to me and I have been furnishing them since then. I have been paying Pearce the rent since I began to furnish them again.



I made Snell get a statement from Pearce about the rent before I would furnish them. Pearce gave me a written statement to the effect that all he wanted as rent was one-fourth of the cotton. I finally bought the place from Pearce for \$1,000. I made a verbal agreement with them to let them have it back for that amount. The record showed that Pearce paid taxes on the land for eight years consecutively up to the bringing of this suit. The suit was commenced on December 21, 1916. Other facts will be stated or referred to in the opinion.

The chancellor found the issues in favor of the defendants and a decree was entered accordingly. The plaintiffs have appealed.

HART, J., (after stating the facts). In *Hays v. Emerson*, 75 Ark. 554, the court said: "It is insisted, however, that the consideration for the deed being a pre-existing debt owing by the grantor to the grantee, the contemporaneous agreement for an immediate resale of the property to the grantor on a credit for the same price, stamps the conveyance as a security for the debt merely, and not an absolute conveyance, regardless of the real intention of the parties. Such is not the law. The contemporaneous agreement for a resale and purchase does not, of itself, make the deed a mortgage. The conveyance must be judged according to the real intent of the parties. If there is a debt subsisting between the parties, and it is the intention to continue the debt, it is a mortgage; but if the conveyance extinguishes the debt and the parties intend that result, a contract for a resale at the same price does not destroy the character of the deed as an absolute conveyance." This principle was recognized in *Wimberly v. Scoggin*, 128 Ark. 67, 193 S. W. 264, and in addition the court said:

(1) "For the purpose of ascertaining the true intention of the parties, it is a well established rule that courts will not be limited to the terms of the written contract, but will consider all the circumstances connected with it, such as the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasance,

verbal or written, as well as the acts and declarations of the parties, and will decide upon the contract and the circumstances taken together." In both those cases, it was recognized that a conveyance absolute in form is presumed to be a deed, and that to overcome this presumption and to show the instrument to be a mortgage, the evidence, in the absence of fraud or imposition, must be clear, unequivocal and convincing.

(2) Tested by these well established principles of law, the decision of the chancellor was correct and must be upheld on appeal. The record sets out the testimony of the parties in full, but it is not practical to set out all the evidence in detail in this opinion. A careful examination of the record, however, shows that Pearce was trying to state the testimony as he recollected it. He stated that in February, 1906, when the land was first conveyed to him that it was not worth more than \$2 per acre; that he owned over one thousand acres of other land in that immediate neighborhood and knew their value. His testimony in this respect was not attempted to be contradicted. When his whole testimony is read together, it is fairly inferable that when the deed of the date of February 15, 1906, was executed that he thought the lands in question belonged to John Snell, for he took a deed from John Snell, and George Ann Snell only relinquished dower in the deed. On the same day he executed a written contract with John Snell for a resale of these lands to him and in the contract also embraced other lands of his own. The consideration in the deed to Pearce was \$300. In the contract for a resale of the land the consideration was \$506, evidenced by the four promissory notes of John Snell. This was a circumstance tending to show that it was not the intention of the parties to consider the transaction as a mortgage from Snell to Pearce. Only forty acres of the lands in question were embraced in this deed. In December John Snell executed a deed to Pearce for the remaining eighty acres. In this deed George Ann Snell relinquished dower. On the 14th day of December, 1906, George Ann Snell executed a deed to Pearce for the

120 acres of land in controversy and the consideration is recited to be \$250.

It is fairly inferable from all the testimony in the record that it was ascertained by Pearce that the title to the land was in George Ann Snell instead of her husband, and for that reason the last mentioned deed was executed by George Ann Snell. This conclusion is borne out by the fact that Pearce testified that on that day he again agreed to resell the land to John Snell and that a written contract to that effect on the same printed form as the first contract of resale was entered into between them. Pearce said that he made no effort to keep either of these contracts because they had ceased to be of any binding force because Snell had failed to make the payments required; that he only happened to have the first contract because it was among some old papers. According to the testimony of both Pearce and White the Snells began to pay rent in 1910 to Pearce. They continued to pay rent to him until the date of bringing this suit. For the eight years prior to the institution of this action Pearce had been paying the taxes on the land. It does not appear that the land had risen in value much until a few years before the institution of this action. It is true this testimony is contradicted to a great extent by the testimony of George Ann Snell and her husband, but they make no attempt to explain why they permitted Pearce to pay the taxes on the land, and to pay rent to White for him.

Tested by the rule above announced, the chancellor was warranted in holding that the conveyance to Pearce was an absolute deed and was not a mortgage. The plaintiffs forfeited their rights under the contract of sale executed by Pearce by not making the payments required by the contract, and the chancellor was justified in so holding under the evidence.

It follows that the decree must be affirmed.

## STUCKEY v. HORN.

Opinion delivered January 28, 1918.

1. **HOMESTEAD—CLAIM OF WIDOW AND CHILDREN.**—The homestead right is a derivative one, and the widow and minor children have the homestead which the husband and ancestor could have claimed.
2. **HOMESTEAD—GRANT OF EASEMENT CUTTING SAME INTO SEGMENTS.**—The homestead right to the whole of a tract of agricultural land is not destroyed by the grant of an easement to a railway company over the same, which cuts the original tract into two segments.
3. **HOMESTEAD—RURAL CHARACTER.**—Land used solely for agricultural purposes, and never platted into lots, although contiguous to an unincorporated town, *held* to constitute a rural homestead.

Appeal from Saline Chancery Court; *J. P. Henderson*, Chancellor; affirmed.

*Ben F. Reinberger*, for appellant.

The leases are void, and should be set aside. The homestead was urban in a town or village, and consisted of one acre. The balance of the land should be partitioned among the heirs. Kirby's Digest, § § 3791, 3899, 3900; 20 Ark. 56; 71 Ill. 568; 21 *Id.* 48; 113 Wis. 399; 86 N. W. 677; 32 Tex. Civ. App. 18; 119 U. S. 680; 151 Ala. 561.

*W. R. Donham*, for appellees.

The whole tract was a rural homestead, and could not be partitioned. Const., art. 9, § 6; Kirby's Digest, § 4309; 92 Ark. 260; 31 *Id.* 145; 47 *Id.* 504; 47 *Id.* 445; 49 *Id.* 75; 50 *Id.* 329; 52 *Id.* 213; 56 *Id.* 534; 61 *Id.* 26.

The leases were legal. 61 Ark. 26; 82 *Id.* 514; 125 *Id.* 291; 123 *Id.* 189.

The widow and children were entitled to the whole tract as a homestead, and could rent or lease it. 53 Ark. 400; 95 *Id.* 246; 93 *Id.* 353.

SMITH, J. One Chris Stuckey died intestate on December 26, 1909, and left surviving him his widow and seven minor children. William Stuckey was the oldest child and he reached his majority on June 29, 1916. Thereafter William Stuckey brought suit for the parti-

tion of certain lands described in his complaint. He alleged therein that the widow, for herself and as guardian for the minor children, had executed leases of the land described to the Bauxite Mercantile Company, a copartnership, and to the American Bauxite Company. That the lease to the American Bauxite Company was a mineral lease under which that company, if it desired to mine the bauxite, might do so by paying a stipulated royalty, but otherwise should pay an annual rental of \$50. It was further alleged that the land was wild and unimproved and that the leases were not for improvements but that said leases were made with the guardian for the purpose of creating an exclusion of business near and adjacent to the bauxite mines.

The lessees were made parties, and there was a prayer that these leases be canceled and the land partitioned.

It was alleged in the answer, and the court found the facts so to be, that the land constituted a homestead and that the leases were valid and that the property was not subject to partition.

The plaintiff admitted the existence of a homestead right in the land in question; but the nature and extent of this homestead are the controlling questions in the case. The plaintiff alleged that the homestead was an urban one, and should be limited to one acre, but that, if it were held to be a rural homestead, the entire tract should not be included for the reason that ten or fifteen acres of the land were not contiguous to the remainder and had not been claimed or considered by plaintiff's father as a homestead in his lifetime.

The tract of land contains about eighty acres, and the testimony shows that the Bauxite & Northern railroad crosses the land and segregates a wedge-shaped piece of the land, containing about ten or fifteen acres, from the remainder, and it is said that the segregated piece is not a part of the homestead. A right-of-way one hundred feet was secured by condemnation proceeding in 1907 and in the judgment it was provided that the right-of-way "be

vested in the Bauxite & Northern Railway Company, its successors and assigns, as a right-of-way, to be held and enjoyed by it, its successors and assigns, so long as it is held by it, or them, or either of them, as and for a right-of-way."

(1) The homestead right is a derivative one, and the widow and the minor children have the homestead which the husband and ancestor could have claimed. And, if it be true that the eighty-acre tract of land constituted the homestead of Chris Stuckey before the condemnation proceedings, the character of the portion not taken by that proceeding remained unchanged thereafter. The segments thereof were contiguous within the requirement of the law that the land claimed as a homestead be contiguous, and this is unquestionably true under the facts of this record, for an easement only was condemned by the railway company, and the land owner was left with the fee title to the entire body of land.

(2) In the case of *McCrosky v. Walker*, 55 Ark. 303, it was held that the homestead can not consist of two non-contiguous tracts of land; but, in the case of *Clements v. Crawford County Bank*, 64 Ark. 7, it was held that a homestead could be claimed in two parcels of land which corner with each other. It was said in that case, and has several times been repeated, that the homestead law should be liberally construed to effect its benign purpose, and any such construction would preclude the holding that the lands here involved are not contiguous. In 13 R. C. L., in the article on Homestead, at section 41 thereof, it is said:

"A homestead right to the whole of a tract of agricultural land is not destroyed by a grant of a right-of-way through it to a railroad company, a part of which is an absolute grant, and partly the creation of an easement; nor does such conveyance operate to so divide the tract as to make the land only on one side of right-of-way subject to the homestead right."

Some testimony was offered to the effect that Chris Stuckey did not claim the entire eighty acres as his home-

stead, and that he had planned to improve the smaller portion of land by building rental houses thereon. This was never done, however, and there was other testimony to the effect that Chris Stuckey regarded the entire eighty-acre tract as his homestead. We can not say that the finding that the entire eighty-acre tract was claimed as a homestead, is against the preponderance of the evidence. Chris Stuckey occupied a portion of the land as a home. He might have claimed the entire eighty-acre tract as his homestead. It would have been to his advantage to do so, and the presumption arises that he did so, and the evidence does not overcome this presumption and the finding of the court below.

(3) The close question in the case is whether the land was a rural or an urban homestead. The testimony shows that the land was situated adjacent to a village which had once been known as Perrysmith. That the presence of bauxite in adjoining lands was discovered, and, when these lands were purchased and acquired by the American Bauxite Company, and, when that company began to mine the bauxite, the name of the village was changed to Bauxite. This village was never incorporated, but it was shown to be the site of a school having an enrollment of about six hundred pupils, and there were two churches, a bank, a drug store, two mercantile houses, a barber shop, a butcher shop and a number of residences in this village. It appears that the name Bauxite was given, not only to the village, but to the properties operated by the bauxite company, which consisted of about five thousand acres of land, and that about three thousand people lived on various parts of these lands, and the principal employment of the residents consisted in labor performed for the bauxite company. It was shown that none of the children attending the school lived on the Stuckey lands. Stuckey had, himself, sold a portion of his original tract of land to the bauxite company, which company had built five houses on the land so purchased. The land in controversy was not in the village of Bauxite, but adjacent to it. Only one road ran across the land,

and the property had never been platted into lots and blocks. The land was a farm, and only a portion thereof in cultivation. The case of *Spaulding v. Haley*, 101 Ark. 296, presented a very similar question under the facts of that case, and in the syllabus there it is said:

“Where land jutted into the outskirts of a village, but was used entirely for agricultural purposes, although part of it had been divided into lots by a prior owner without making a plat or subdivision of it, a finding of the chancellor that it constituted a rural, and not an urban, homestead, will not be set aside.”

The land in this litigation had not even been divided into lots. Under this test, we think the land a rural homestead, and not an urban one, and the widow and minor children are not, therefore, limited to a claim of one acre, but may claim the entire eighty-acre tract as a homestead.

The question of waste passes out of the case under the undisputed evidence. It is shown that numerous and exhaustive tests were made for bauxite, but none was found in commercial quantities, and no attempt was made, or is being made, to operate any mines on the property. Being a homestead, the land is not, therefore, subject to partition, and as the plaintiff has attained his majority he has no right to disturb the possession of the widow and minor children, although that possession is held through the tenants of the widow and the infant children. Article 9, section 6, Constitution 1874; *Cherokee Construction Co. v. Harris*, 92 Ark. 260, and cases there cited.

Decree affirmed.

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#### BYINGTON v. LITTLE ROCK CHAMBER OF COMMERCE.

Opinion delivered February 4, 1918.

**CONTRACTS—SUBSCRIPTION TO VOLUNTARY PUBLIC ORGANIZATION—PURCHASE OF LAND—STATUTE OF FRAUDS.**—The Little Rock Chamber of Commerce, as a part of its scheme for the development of Little Rock, took deeds to certain lands, and also took money subscriptions from appellant and others, the plan being that, in con-



sideration of appellant's and others' subscriptions, which amounted to a definite sum, the Chamber of Commerce agreed to deed a parcel of land to the subscriber; the subscriber had the right to choose a parcel to be deeded to him, and if he neglected to do so, the Chamber of Commerce reserved the right to set apart to him a parcel of land which it should select. Appellant became a subscriber, but refused to pay his subscription or to select a parcel of land. The Chamber of Commerce set apart a lot of land for him, and sued for the amount of appellant's subscription. Appellant plead the statute of frauds. *Held*, the statute of frauds was not applicable, and that the Chamber of Commerce, under the facts, could maintain its action, and recover from appellant the amount of his subscription.

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; affirmed.

*Marshall & Coffman, J. A. Comer and Manning, Emerson & Donham*, for appellant.

1. The demurrer should have been sustained. This was merely a suit not based upon a contract to enforce specific performance but to enforce a contract which appellant *did not enter into but which he contracted to enter into*. It is clearly against the statute of frauds. Kirby's Digest, § 3654. There was no meeting of minds. 21 Ark. 502.

The terms can not be ascertained without resort to extrinsic evidence. 45 Ark. 17. The contract was uncertain and indefinite. 76 Ark. 237. The lands were not described. 85 *Id.* 1; 106 *Id.* 83; 119 *Id.* 301; 2 Kent, Com. 511; 6 R. C. L. 38; 54 So. 953. See also 56 Atl. 742; 86 N. W. 1082; 48 So. 363; 25 *Id.* 709; 55 *Id.* 102; 106 Pac. 839. The court erred in overruling the motion to make the complaint more specific and in overruling the demurrer.

*W. B. Smith and John P. Streepey*, for appellee.

1. The demurrer was properly overruled. The statute of frauds was no bar. 36 L. R. A. (N. S.) 154. Proof was admissible to make the contract certain. 1 Elliott on Cont., § 179; 2 L. R. A. (N. S.) 210; 67 N. E. 340; 9 Dec.,

§ 110; 28 N. E. 227; 145 S. W. 377, 383; 97 N. E. 96; 43 *Id.* 35; 114 Ark. 436-9.

2. The cases cited by appellant are not in point. The execution of the formal contract took the case out of the statute of frauds. 102 Ark. 377, 386. The statute has no application to the facts here. 48 L. R. A. (N. S.) 783, 790; 64 Ark. 627-637; 47 N. E. 649. See also 113 Ark. 439; 120 *Id.* 426.

3. The promise of a subscriber is a sufficient consideration. 97 N. E. 958-961; Ann. Cas. 1913 (B), 238; 49 Cal. 347; 32 Conn. 412; 78 S. W. 435; 13 Mo. App. 7; 17 Am. Dec. 446; 2 Denio (N. Y.), 403; 5 Harr. (Del.), 346; 68 N. E. 320-326.

McCULLOCH, C. J. This case was disposed of below on demurrer to the complaint of appellee, and the only question presented here is whether or not the facts stated in the complaint constituted a cause of action. The facts set forth in the complaint are in substance as follows:

The Little Rock Chamber of Commerce is a corporation organized by citizens of the city of Little Rock for the purpose, as its name implies, of promoting the business interests of the city, and among other things of encouraging public improvements of all kinds and particularly to secure the location of factories and other business enterprises in the city and vicinity. One of the by-laws provides for the creation of a committee called the "Industrial and Development Committee" to have control of the disposition of development and industrial funds raised by the Chamber of Commerce and with authority to receive and distribute donations made for that purpose. In the year 1911 a plan was devised for raising a large sum of money, not less than \$200,000, to use in securing the location of factories and other business enterprises, and the plan contemplated securing from the real estate owners of the city and vicinity donations of real estate of \$200,000 estimated enhanced value in five years by reason of the location of the industries to be thus

secured, and also securing subscriptions in money from those who were willing to become the purchasers of the real estate thus donated at prices corresponding with said estimates of the enhanced value. Public appeals were made to citizens of Little Rock for donations of land and subscriptions of money upon the assumption that the proper use of the funds thus raised for the development of factories and other enterprises would, during the period of five years, result in substantial enhancement of values of real estate to the extent that owners of real estate would secure the enhancement in value on their lands sufficient to compensate for the donations made by them, and that the subscribers who were to receive the real estate at valuations based on the estimated enhancement during said period would secure, by way of profit on the investment, sufficient compensation to reimburse them for the amount subscribed. The plan was carried out and donations of lands were obtained in excess of the amount named and subscriptions of money on the terms stated above were obtained in excess of the said sum. There were printed blanks for the two classes of subscribers, the one used by the donors of lands provided that in consideration of \$1 and the benefits to accrue from the expenditure of the funds thus raised the donor agreed to donate to the Little Rock Chamber of Commerce the real estate described in the contract on condition that "the said Chamber of Commerce by March 1, 1912, shall have made sales of property donated to it amounting in the aggregate to \$200,000."

The subscription blanks signed by those who subscribed money were in the following form:

"The undersigned, as subscriber, hereby agrees to purchase ..... dollars in appraised value of real estate from Little Rock Chamber of Commerce acquired by it for industrial and development purposes, and agrees to pay for same; five per cent. upon delivery of contract and two per cent. per month without interest, until fully paid. This purchase is upon the condition that the Little Rock Chamber of Commerce make sales of the property

acquired by it for industrial and development purposes to the aggregate amount of \$200,000.

"It is agreed that the Chamber of Commerce will have the real property acquired by it appraised by a committee appointed for that purpose at its probable value on the first day of January, 1917, as enhanced by the probable growth of the city and the use for industrial and development purposes by the Chamber of Commerce of the fund raised for that purpose, and that the subscriber hereto shall have the right of selection of ..... dollars in value of said property at its appraised value in the order of his subscription, upon notice being given by the Chamber of Commerce that the property is ready to be allotted; and it is further understood that if the subscriber does not promptly apply for his allotment, that the real estate committee which appraised said property shall have the right to make the allotment so that the succeeding subscribers may exercise their right of selection in the order in which their subscriptions were taken.

"It is further agreed that upon said selection or allotment being made, the subscriber will enter into a further formal written contract of purchase of the particular property selected or allotted according to the terms of his subscription, and that upon the subscriber making the five per cent. payment, he shall be entitled to go into the immediate possession of said property, but the Little Rock Chamber of Commerce will retain the title of the property until the payments are fully made, the said contract to contain the usual provisions of forfeiture contained in the contracts in use by the real estate agents of Little Rock where property is sold on the partial payment plan.

"It is further agreed that upon the subscriber making full payments of the purchase price the Little Rock Chamber of Commerce will execute to him a special warranty deed for said property."

Appellant signed the form of contract providing for the payment of money and the acceptance of an allotment of real estate The committee of the Chamber of Com-

merce made the appraisement of the lands donated and more than four-fifths of the contracts for the donation of lands and the acceptance thereof by the persons who undertook to do so have been performed, but appellant failed to make a selection of his allotment of real estate in accordance with the terms of the contract, and when the allotment to him was made by the committee in accordance with those terms he declined to perform the contract. Compliance with the contract on the part of the Chamber of Commerce is alleged in the complaint, and in this action, instituted by the Chamber of Commerce, offer is made to comply with the contract and the prayer of the complaint is for recovery from defendant of the amount of his subscription, and that he be required to accept the real estate allotted to him.

The contention of counsel for defendant in avoidance of the contract is that it is one for the sale of real estate, and is within the statute of frauds and void by reason of the fact that no particular land was described, but that the undertaking is to purchase land to be secured in the future by the other party to the contract. It is also argued that specific performance should not be decreed for the reason that defendant did not undertake to accept the conveyance of any particular tract of land.

We are of the opinion that the contract when interpreted in the light of its subject-matter and the situation of the parties as set forth in the complaint is not one for the sale of real estate within the meaning of the statute of frauds, but that it is a contract for a subscription by the defendant jointly with others to a common fund to be used for a specified purpose. Such a contract is not within the statute of frauds. The fact that separate contracts were signed by the respective subscribers instead of a joint subscription list does not necessarily show that the several agreements thus executed were not directed to the same end and purpose, nor destroy the mutuality of the undertakings. All of the contracts executed, under the circumstances shown, constituted a joint contract on the part of the subscribers. *Belding v. Vaughan*, 108 Ark.

69. And the mutual undertakings expressed in the numerous subscriptions when acted upon by the Chamber of Commerce, which was the agent of the subscribers, constituted a binding consideration. *Rogers v. Galloway Female College*, 64 Ark. 627; *David v. Chambers*, 123 Ark. 293; 1 Elliott on Contracts, § 229; *Young Men's Christian Association v. Estill*, 140 Ga. 291, 48 L. R. A. (N. S.) 783; *Stewart v. Trustees, Hamilton College*, 2 Denio (N. Y.) 403; *Norton v. Janvier*, 5 Harr. (Del.) 346; *Brown v. Marion Commercial Club*, 97 N. E. (Ind.) 358.

It is a mistake, in the interpretation of the contract, for us to leave out of consideration the exact status of the Chamber of Commerce as one of the contracting parties. It was not engaged in the real estate business, nor did it have property for sale about which the parties were contracting. The Chamber of Commerce was acting in a quasi-public capacity for the purpose of promoting the welfare of the community, and the contract as a whole constituted it as the agent of the subscribers—to gather together lands to be donated and to allot them among the subscribers who agreed to pay money. It is true that in the contract the subscriber undertook to purchase the land to be allotted to him. He was also designated in the contract as a subscriber. A literal interpretation of the particular words used in the contract might defeat its obvious purpose, and when, as before stated, we interpret the language in the light of the circumstances we can see that the meaning of the contract is that it is an undertaking to subscribe and pay a certain sum of money on conditions specified in the contract, that is to say, the subscriber shall have the right to select his allotment of land in regular turn, or, in the event of his failure to make selection himself, that an allotment will be made to him by the appraisers. This being the effect of the contract, it would be a mistake to treat it merely as a contract for the sale of land. Plaintiff having offered to perform the condition prescribed in the contract by allotting to defendant his part of the land at the appraised value, the right to recover the subscription price is mature and the cause of

action is complete. It is said that this is in effect requiring the specific performance of the contract. Conceding that such is the effect of the relief granted, it does not follow that relief should be denied merely because the contract, if treated as one for the sale of real estate, would be too indefinite for a court of equity to enforce. The essence of the contract was to pay money upon the condition named, and if it be conceded to be too indefinite to require specific performance when treated as a contract for the sale of lands, yet this does not afford grounds for defendant to escape liability on his subscription contract merely because the effect of the enforcement of the contract is to require him to accept the land allotted to him. He is not bound to accept it, as his acceptance is not a part of the relief afforded to the plaintiff. All that the plaintiff had to do was to tender performance and the relief to which it is entitled is the recovery of the amount of the subscription. The enforced acceptance under the decree of the court is for the benefit of the defendant, and he is not bound to accept the land unless he wishes to do so, but he must pay the subscription because the other party to the contract has offered to perform his part. Decree affirmed.

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McDONALD v. HILL.

Opinion delivered February 25, 1918.

PLEADING AND PRACTICE—COMPLAINT ASKING RENT—PROOF OF TORT.—

Where a complaint asked damages for the use of an article as rent, it is improper to admit testimony and permit the cause to go to the jury on the issue of the negligent use of the article.

Appeal from Little River Circuit Court; *Jefferson T. Cowling, Judge*; reversed.

*June R. Morrell*, for appellants.

1. Immaterial testimony was introduced to the prejudice of appellants, as to the authority of Hill to rent or loan the machine, and as to its damaged condition. The action was changed from contract to tort.

2. It was error to 'treat the complaint as amended and refusing time to meet the issue. 88 Ark. 181.

3. The court erred in its instructions. Where property is loaned, or where the parties using the same are led to believe that no rent will be charged, the owner can not afterwards charge rent for use of the property. 68 Ark. 146; 101 *Id.* 504.

*A. D. Dulaney and John J. Dulaney, for appellees.*

1. The court did not err in treating the complaint as amended to conform to the proof. Kirby's Digest, § 6145; 124 Ark. 232. No abuse of discretion is shown, nor was prejudice shown. 100 *Id.* 216; 88 *Id.* 181; 103 *Id.* 79; 104 *Id.* 276.

2. No new cause of action was raised or stated by the amendment. 83 Ark. 290; Acts 1905, 798. See also 49 Ark. 253; 54 *Id.* 216; 59 *Id.* 312; 33 *Id.* 107; Kirby's Digest, § § 6140-5; 94 Ark. 367; 31 Cyc. 401.

3. No error in permitting testimony as to the damaged condition of the machine. 104 Ark. 79; 87 *Id.* 396; 101 *Id.* 147; 95 *Id.* 155. It was not prejudicial. 55 *Id.* 163; 78 *Id.* 374; 94 *Id.* 115.

4. There is no error in the instructions. 6 C. J. 1127; 83 Ark. 10; 68 *Id.* 146; 101 *Id.* 504.

McCULLOCH, C. J. Appellee instituted this action against appellant to recover a sum of money alleged to be due for the rent of an under-reamer, a tool or machine used in the drilling of wells, and it is alleged in the complaint that appellants rented the tool and used it for a period of 60 days, and that a reasonable rental value thereof was \$10.00 per day. Appellants filed an answer denying that they rented the tool or machine from appellees. There was a trial of the issues before a jury and the evidence adduced by appellees tended to show that appellants obtained possession of the under-reamer from them for use and that there was no specific agreement for the payment of rent, but that the circumstances were such that the jury might have inferred an agreement on the part of appellants to pay a reasonable rent for the



use of it. On the other hand, the testimony of appellants tended to show that appellees lent them the machine gratuitously under circumstances which excluded any legitimate inference of an agreement to pay for its use. The testimony seems to have been sufficient to support a verdict either way on the question of liability of appellants for the payment of a reasonable sum as rent of the machine during the time they used it.

During the progress of the trial appellees were permitted, over the objections of appellants, to prove by witnesses that the machine deteriorated from use of it by appellants, and that it was not in as good condition when returned as it was when appellants received it. Some of the witnesses testified that the machine was practically valueless when returned. There was, however, no testimony tending to show improper or negligent use of the machine by appellants, the testimony being confined to deterioration from ordinary use. The court, over the objection of appellants, treated the complaint as amended so as to set forth grounds for recovery for the damage done to the machine, and instructed the jury that if appellants "obtained possession of this machine and kept it and used it, and brought it back in a damaged condition" the verdict should be for the plaintiff, "and the measure of damage would be the difference between the value of this machine at the time they received it and the time they returned it, or what it would cost to repair it, if it could be repaired."

The amendment and the instruction of the court submitting the issue to the jury constituted a complete change of the cause of action from contract to tort, and it was error for the court to permit that to be done. *Grist v. Lee*, 124 Ark. 206. Moreover, the evidence was wholly insufficient to warrant a submission of the issue of negligence on the part of appellants in the use of the machine or wrongfully withholding the machine so as to justify recovery of damages. The evidence of deterioration of the machine from ordinary use was competent to aid the jury in estimating the reasonable rental value,

but it was not competent to establish a right of action for the negligent use or wrongful withholding of the machine. In fact, the only issue presented by the evidence was whether or not there was a renting of the machine under an implied agreement to pay for its use or whether there was merely a gratuitous lending of the machine.

The court was, therefore, in error, not only in permitting the change in the cause of action, but also in its charge to the jury stating that the measure of recovery would be the difference between the value of the machine at the time it was delivered to appellants and its value at the time of its return.

Reversed and remanded for a new trial.

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THREE STATES LUMBER Co. v. MOORE.

Opinion delivered February 25, 1918.

1. **PRINCIPAL AND AGENT—VIOLATION OF SPECIFIC INSTRUCTIONS—NOTICE.**—An agent, acting within the apparent scope of his employment, though in violation of specific instructions, may bind his principal in dealing with one who has no notice of the restrictions upon the agent's authority; but the rule is otherwise where the agency is special, and not general, that is, where the agent's authority is to be confined to a single transaction or to a particular act, there is no presumption as to general authority, and one dealing with him must ascertain the extent of his authority.
2. **PRINCIPAL AND AGENT—GENERAL AGENT—PRESUMPTION AS TO AUTHORITY.**—One dealing with an admitted agent has the right to presume, in the absence of notice to the contrary, that he is a general agent clothed with authority coextensive with its apparent scope.

Appeal from Mississippi Circuit Court, Osceola District; *W. J. Driver*, Judge; affirmed.

*Lamb & Rhodes*, for appellant.

1. Tompkins was a special agent and had no authority to make the contract. The instructions given were erroneous. 90 Ark. 278; 96 *Id.* 614; 80 *Id.* 454; 70 *Id.* 385; 105 *Id.* 111-116.

2. The evidence shows that Tompkins never made the contract. He had no authority to make it, and it was not within the apparent scope of his authority to make it. Cases *supra*.

McCULLOCH, C. J. Appellant is the owner of certain lands in Mississippi County, and instituted this action of unlawful detainer against appellee to recover possession of the portion thereof which he was alleged to be unlawfully withholding after having occupied same as appellant's tenant. Appellee was put out of possession under the writ issued at the commencement of the action, and claims damages. There was trial of the cause before a jury and the verdict was in appellee's favor, awarding damages for being wrongfully put out of possession under the writ.

The land was leased by appellant's agent to one Robinson for a term ending December 31, 1916, and appellee obtained possession as a sub-renter under Robinson. Appellee claims that just before the expiration of the lease he rented the lands from appellant's agent for the year 1917 and held possession pursuant to that contract. He also claims that he planted a part of his crop upon the faith of the contract that he was to occupy the premises for that year.

On the trial of the cause appellee adduced testimony sufficient to warrant the finding that Tompkins, the agent of appellant, entered into a contract with appellee for the renting of the premises for the year 1917 at the price of \$8.00 per acre. The testimony adduced by appellant was to the effect that Tompkins was the agent of appellant with authority to rent its lands for the year 1917, but that he was instructed to rent only for a share of the crop, and not for money rent. There is some uncertainty in the testimony as to whether appellee had notice of the limitation upon the authority of Tompkins with respect to the particular kind of rent contract and the jury might have found either way on that question. It was submitted to the jury and we must treat the ver-

dict of the jury as settling the issue in appellee's favor that he dealt with Tompkins without notice of the limitations upon the latter's authority.

The contention of the appellant is that it being undisputed that the authority of Tompkins was restricted to a renting of the lands for a share of the crop, appellee was bound to take notice of those restrictions, and that a contract made by Tompkins in violation of his instruction was not binding upon appellant. The law is that an agent acting within the apparent scope of his authority, though in violation of specific instructions, may bind his principal in dealing with one who has no notice of the restrictions upon the agent's authority. *Parsel v. Barnes*, 25 Ark. 261; *Jacoway v. Insurance Co.*, 49 Ark. 320; *Liddell v. Sahline*, 55 Ark. 627; *Forrester-Duncan Land Co. v. Evatt*, 90 Ark. 301; *Brown v. Brown*, 96 Ark. 456.

An exception to that rule is that where the agency is special, and not general, that is to say, where his authority is to be confined to a single transaction or to a particular act, there is no presumption as to general authority, and one dealing with him must ascertain the extent of his authority. *Liddell v. Sahline*, *supra*; *Mutual Life Insurance Co. v. Reynolds*, 81 Ark. 202; *Jonesboro, Lake City & Eastern Rd. Co. v. McClelland*, 104 Ark. 150. But one dealing with an admitted agent has the right to presume, in the absence of notice to the contrary, that he is a general agent clothed with authority coextensive with its apparent scope. *Oak Leaf Mill Co. v. Cooper*, 103 Ark. 79.

Tompkins was a general agent with authority to rent appellant's lands and it was within the apparent scope of his authority to fix the terms of the rental contracts. Those who dealt with him in the transactions were not bound to take notice of specific instructions which constituted restrictions upon his authority with respect to the terms of the contract.

The instructions of the court submitting the issues to the jury were not in conflict with the law as here an-

nounced, and the evidence was legally sufficient to warrant a verdict in appellee's favor.

Judgment affirmed.

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HABACH v. JOHNSON.

Opinion delivered February 25, 1918.

1. USURY—PAYMENT TO AGENT OF LENDER.—A transaction is no less usurious because payment is made to the agent of the lender, where the reservation was made by the lender himself.
2. USURY—OFFER TO REMIT.—A suit was brought to enforce a contract, which if enforced according to its terms would result in the exaction of usury; *held*, if the contract was usurious in its inception, no subsequent offer to remit the usury can give it validity.
3. USURY—CONTRACT—CONTRACT TO EXACT INTEREST.—The form of a contract is not material, and a contract will be held usurious if, from all the facts and circumstances in the case, it appears that an intent existed at the time the contract was made to take and receive, by way of interest, a sum of money in excess of that allowed by law.

Appeal from Polk Chancery Court; *Jas. D. Shaver*, Chancellor; affirmed.

*J. I. Alley*, for appellant.

1. There was no intent to charge more than the legal rate of interest. 62 Ark. 380.

2. If there was a mistake of fact, by error in calculation or inadvertence, it is not usury. 25 Ark. 191; 41 *Id.* 331; 62 *Id.* 370.

3. The burden to prove usury is on defendant. Usury is never inferred. 83 Ark. 31; 59 *Id.* 366; 57 *Id.* 251.

4. There is no proof that Ray Worthington was the agent of the lender. 57 Ark. 256; 54 *Id.* 40.

5. The usury, if any, should be purged. 62 Ark. 370.

*H. H. Thomas*, for appellee.

1. The loan was clearly usurious and so intended, and the decree of the chancellor should be sustained. 109 Ark. 69.

2. Worthington was Ellis' agent and his act was ratified by Ellis. 54 Ark. 573; 54 *Id.* 40; 51 *Id.* 546; *Ib.* 534.

3. There was no mistake. 2 Elliott Cont., § 967, p. 269; 50 N. Y. 437; 97 Ala. 417; 165 Mich. 498; 91 Ark. 458.

4. Ignorance of the law is no defense and the transfer gave no validity to the void contract. 41 Ark. 331; 77 *Id.* 103.

5. The offer to purge the usury is unavailing unless a new consideration was had and a new contract made. 62 Ark. 360, 375-6.

6. The loan was usurious under the laws of New York or Arkansas or Oklahoma. 60 Ark. 269; 72 *Id.* 83; 46 *Id.* 50, 66.

7. The findings of the chancellor are sustained by the evidence. 95 Ark. 482.

SMITH, J. George W. Johnson and his wife executed their joint note on March 20, 1912, to Edwin S. Ellis for the sum of \$800.00, bearing interest at the rate of six per cent. per annum, payable semi-annually, and due five years from date. They also executed ten notes, for \$24.00 each, covering the interest on this loan. The notes were secured by a mortgage on a tract of land owned by the Johnsons, and were assigned, before maturity, for value, to Mrs. Henrietta Habach. Six of these interest notes were paid, when, upon default being made in the payment of the next note to fall due, Mrs. Habach brought suit to foreclose the mortgage which secured its payment. After the complaint had been filed for this purpose, an amendment was filed, in which it was alleged that, by calculation, it had been ascertained that the loan to the Johnsons was usurious; and there was a disclaimer of any intention of taking usury, and a denial of the existence of any such intent at the time the notes were executed; and there was a prayer that plaintiff be allowed to remit any claim for interest beyond that allowed by law. Ellis was the president of the Jefferson Trust Com-

pany, of McAlester, Oklahoma, a corporation engaged in lending money and in negotiating sales of notes for money loaned.

(1) Johnson applied for this loan to W. A. Worthington, who, according to Johnson's testimony, was the agent of the trust company working for a salary. He testified that Worthington stated that it was the policy of the trust company to loan money for five years at nine per cent. interest per annum, and Johnson applied for a loan of \$800.00 on those terms. There was offered in evidence a writing signed by Johnson and his wife, in which they agreed to pay Ray A. Worthington the sum of \$120.00 for negotiating this loan. Johnson disclaimed any recollection of having signed this agreement, and testified that he did not know Ray Worthington and that he had had no dealings with him, but that he dealt with W. A. Worthington as the agent of the trust company. The loan was approved and the trust company wrote Johnson a letter, which was signed by Ellis in his official capacity, in which it was stated that "Enclosed we hand you check for \$680.00, in full payment of your loan after deducting cash commission of \$120.00." Johnson testified that he did not know, until after he had paid six of these interest notes, that the contract was usurious. Johnson insists that this \$120.00 as commission was reserved by Ellis himself and that while he does not show that he knows this to be a fact no one testified to the contrary. But, at any rate, the court might well have found that the agreement to pay the commission to Ray Worthington, who had nothing to do with negotiating the loan, was a subterfuge adopted for the purpose of giving color to a transaction which would otherwise have been usurious on its face. The court did find that the loan was usurious, and the unpaid notes and the mortgage were canceled. It is conceded that the execution of the loan contract according to its terms will result in the exaction of usurious interest; and we think the court was warranted in finding that, if this commission was not paid to the lender himself, it was paid to his agent, and, if so,

there can be no question of the lender's knowledge of its retention, for he, himself, reserved the commission. *Banks v. Flint*, 54 Ark. 40; *May v. Flint*, 54 Ark. 573; *Baird v. Millwood*, 51 Ark. 548; *Thompson v. Ingram*, 51 Ark. 546.

It is insisted that no intention to take usury is shown. Neither the lender nor any one representing him testified that there had been any inadvertence or mistake of fact or error in calculation which tended to show that there was no such purpose. *Garvin v. Linton*, 62 Ark. 380.

(2) A suit was brought to enforce a contract which if enforced according to its terms resulted in the exaction of usury; and if the contract was usurious in its inception, no subsequent offer to remit the usury can give it validity. It is true, as stated, that an amendment to the complaint was filed in which it was alleged that it was through a mistake of fact that the parties had contracted for usurious interest and that no such intention existed when the loan was made. No testimony was offered in support of these allegations, however. Upon the contrary, it was shown that the lender was largely engaged in the business of negotiating loans of money, one of which loans we held usurious in the case of *Ellis v. Terrell*, 109 Ark. 69.

(3) The form of the contract is not material, but the transaction will be held usurious if, from all the facts and circumstances in the case, it appears that an intent existed at the time the contract was made to take and receive, by way of interest, a sum of money in excess of that allowed by law. *Elliott on Contracts*, Vol. 2, page 269; *Fiedler v. Darrin*, 50 N. Y. 437.

Johnson testified that it was his purpose to pay this debt, less the usury charged, and counsel for appellant asks that this declared purpose be given effect by rendering judgment for the sum due less the usury. We are unable to do so, however, for the reason that the statement made was purely voluntary and without consideration to support it as a valid and binding agreement.

Decree affirmed.



## WARMACK v. PERKINS.

Opinion delivered February 11, 1918.

1. **REAL ESTATE BROKERS—COMMISSIONS.**—Held, a real estate broker was entitled to a commission where he produced a purchaser, ready, willing and able to buy upon the terms named by the seller.
2. **SALE OF LAND—CONTRACT.**—A contract to purchase land, *held* binding upon the parties.

Appeal from Little River Circuit Court; *Jefferson T. Cowling*, Judge; affirmed.

*June R. Morrell* and *Will Steel*, for appellant.

1. The court must take that view of the evidence most favorable to the party against whom the verdict is directed. 89 Ark. 372; 73 *Id.* 361.

2. Where there is any evidence tending to establish the issue it is error to take the case from the jury. 89 Ark. 372; 77 *Id.* 556; 63 *Id.* 94.

3. Where the intention of the parties is not clear from the contract, on its face, the question should be left to the jury. 89 Ark. 373; 39 *Id.* 414; 89 *Id.* 222.

4. The instrument was prepared by Perkins and it should be construed more strongly against him. 105 Ark. 524; 90 *Id.* 256.

5. The instrument was only an option. 82 Ark. 581; 78 *Id.* 306. Even if ambiguous it was nevertheless intended and understood to be an option. 94 Ark. 461; 106 *Id.* 400; 113 *Id.* 325; 95 *Id.* 449; 86 Fed. 574; 81 Ark. 342; 31 *Id.* 162.

6. The contract was not completed, and the commission was not due or earned until the consideration was paid unless it was shown that Ellis was able and willing to carry out the contract and was prevented by default or failure of Warmack. 81 Ark. 101; 4 R. C. L. 331; *Id.* 315; 80 Ark. 258.

7. The question as to what was the oral contract and when the commission was due should have been left to the jury. It was error to direct a verdict. Authorities *supra*.

*A. D. Dulaney, Geo. R. Steel, Steel & Steel and John J. Dulaney*, for appellee.

1. The instrument was a consummated contract of sale and not an option. It was mutual and binding. 82 Ark. 573; 78 *Id.* 306; 104 *Id.* 459; 104 *Id.* 575; 104 Ga. 107; 6 R. C. L. 603; 21 L. R. A. 132.

2. Oral statements by appellant as to his intention to give an option do not control. 30 Ark. 197; 78 *Id.* 575; 104 *Id.* 575.

3. The instrument is plain and unambiguous and a verdict was properly directed. 20 Ark. 583; 79 *Id.* 175; 78 *Id.* 574; 69 *Id.* 562; 104 *Id.* 267; 97 *Id.* 438.

4. Perkins fully performed his contract and earned the commission. 87 Ark. 511; 97 *Id.* 23; 20 Ann. Cas. 1024; 84 Ark. 462; 53 *Id.* 49; 11 Ann. Cas. 433, 786; 152 N. W. 977; 76 Ark. 375; 55 *Id.* 574.

5. A sale was made and its failure to go through was no fault of appellee. The cases cited by appellant are not in point.

McCULLOCH, C. J. Defendant owned a light, ice and power plant in Ashdown, Arkansas, and operated the same under the name of Ashdown Ice & Power Company. Desiring to sell the property, he entered into a contract with the plaintiff, who was engaged in the real estate business in Ashdown, to find a purchaser for the plant and certain other property owned by defendant, at the price of \$44,000.00. Plaintiff found a purchaser at that price in the person of E. S. Ellis, with whom defendant entered into a written contract as follows:

“This agreement, made and entered into on this the second day of March, 1917, by and between L. M. Warmack, hereinafter known as the party of the first part, and Edward S. Ellis, hereinafter known as the party of the second part.

“WITNESSETH: That the party of the first part has this day agreed to sell to the party of the second part, or his assigns, his light, ice and power plant, together with his block of ground, now where he lives, for

the sum of Forty-four Thousand Dollars (\$44,000.00), on the following terms:

"Fifty Dollars cash, receipt of which is hereby acknowledged. One Thousand Dollars (\$1,000.00) on or before April the first, 1917. Fifteen Thousand Dollars (\$15,000.00) on or before July the first, 1917. At which time the party of the first part agrees to give possession of his entire holdings as above mentioned, with the understanding that the party of the second part shall pay the remaining part of the Forty-four Thousand Dollars (\$44,000.00) on or before January the first, 1918."

The contract was signed by both of the parties thereto. Immediately after the contract was entered into between defendant and Ellis, another person appeared on the scene, a Mr. Morgan, to whom defendant had previously given an option for the sale of the plant. Morgan insisted upon his right to purchase the plant under his option, and filed a suit against defendant and Ellis in the chancery court to prevent the consummation of the sale to Ellis and to compel defendant to make good his option contract. The sale to Ellis has never been consummated. Defendant testified in the case but did not dispute the correctness of plaintiff's testimony concerning the terms of his contract. He merely offered to prove that his contract with Ellis was only an option to sell and that he stood ready at all times to carry out its terms but that Ellis declined to exercise the option and purchase the property. The court refused to admit that testimony for the reason that the contract was in writing and was free from ambiguity.

At the conclusion of the introduction of evidence, defendant, notwithstanding the court's refusal to admit oral testimony showing what the understanding was between him and Ellis in executing the contract, requested the court to charge the jury that if the contract was intended as an option and that defendant was still ready to carry out its terms, plaintiff could not recover. Those were the only issues which defendant asked to be submitted. He did not ask for a submission of any issue

concerning the terms of the contract between him and plaintiff, but treated the question of the effect of the contract between him and Ellis and of his readiness to perform that contract as the only issues in the case.

(1) If the undertaking of defendant, in order to secure a commission, was merely to produce a purchaser "ready, willing and able to buy upon the terms named," and he in fact produced one with whom his principal entered into a contract for the sale of the property, then the commission was earned and plaintiff was entitled to recover. *Pinkerton v. Hudson*, 87 Ark. 511; *Moore v. Irwin*, 89 Ark. 289; *Reeder v. Epps*, 112 Ark. 566; *Lasker-Morris Bank & Trust Co. v. Jones*, 131 Ark. 576.

(2) Such are the facts of this case, according to the undisputed evidence, and the court was correct in directing a verdict in plaintiff's favor. But it is contended that the contract between defendant and Ellis was not a binding one for the sale of the plant because it lacked mutuality in that the contract contained no express undertaking on the part of Ellis to purchase the property. We do not agree with this contention, for both parties signed the contract and the acceptance of its terms by Ellis implied a reciprocal obligation to purchase according to the terms specified in the contract. *Thomas-Huycke-Martin Co. v. Gray*, 94 Ark. 9. Nor was there any ambiguity in the language of the contract as contended on behalf of defendant so as to let in oral testimony.

The court was correct in excluding that testimony, for the contract is entirely free from ambiguity.

Judgment affirmed.

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BENNETT v. BUCKEYE COTTON OIL COMPANY.

Opinion delivered February 11, 1918.

**MASTER AND SERVANT—NEGLIGENCE—QUESTION FOR JURY.**—In an action by an employee of a cotton seed oil mill for damages resulting from a personal injury, caused by defendant's negligence, *held*, under the evidence that the trial court improperly withdrew the case from the jury and directed a verdict for the appellee.

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk*, Judge; reversed.

*Geo. W. Hays* and *Ben D. Brickhouse*, for appellant.

1. There was evidence establishing negligence and the case should have been submitted to the jury. 124 Ark. 386; 100 *Id.* 53; 97 *Id.* 347; 89 *Id.* 522; 87 *Id.* 498; 61 *Id.* 555; 95 *Id.* 294.

2. The failure of appellee to discharge its duty with reference to appliances, was negligence. 3 Labatt M. & S., § 917, pp. 2462-5; 124 Ark. 387; 105 *Id.* 392; 90 *Id.* 223.

3. An ordinary inspection would have disclosed the loose board. 123 Ark. 122. There were two ways of doing the work. Appellant chose the most dangerous, perhaps, but still it was a question for the jury, as his choice was not negligence *per se* on his part. 98 Ark. 554; *Ib.* 202; 113 *Id.* 45; 122 *Id.* 227.

*Cockrill & Armistead*, for appellee.

1. There was no evidence of negligence. Appellant was experienced and no defect in the apparatus is shown. 79 Ark. 437; Labatt, M. & S., § § 1064, 2819; 171 S. W. 876; 90 Ark. 210. A verdict was properly directed.

MCCULLOCH, C. J. Appellant instituted this action against appellee to recover damages on account of personal injuries received while working in the latter's service. On the trial of the cause before a jury the court gave a peremptory instruction in favor of appellee, and the only question presented on this appeal is whether or not there was sufficient evidence to warrant a submission of the issues to the jury.

Appellee operates a cotton oil mill near the city of Little Rock, and in connection therewith also operates a plant for producing animal food stuffs by mixing cotton seed hulls with other products. Appellant was working in its employ at this plant and was engaged in oiling the bearings of a spiral conveyor used to convey the hulls from freight cars to the plant. The spiral conveyor rod was enclosed in a wooden box 16 inches square, outside

measurement, and there was a hopper at the end of the conveyor next to the car door into which the hulls were thrown from the car. The men engaged in unloading the cars forked the hulls into the hopper where they were taken by the conveyor and carried through the box into the hull-house, a distance of something over 50 feet. The conveyor rod was supported by metal hangers about 10 feet apart, and the hanger at the end of the conveyor was between the hopper and the car door. The conveyor was five feet eight inches above the ground and was supported by wooden props or legs. Appellant's method of operating his work was to climb upon the conveyor box at the end next to the hull-house and walk along the box oiling the bearings as he went along. He carried a small wire in his hand with which he cleaned out the lint and hulls from the oiling holes. He was endeavoring to step over the hopper to reach the oil hole at the last hanger when he fell into the hopper and his foot was crushed.

His contention is that as he made the step over the hopper a piece of plank constituting a part of the cover of the conveyor box was loose and turned under his foot and caused him to step into the hopper. The contention of appellee is, as shown by the testimony of the witnesses which were introduced, that appellant took hold of the sides of the hopper and was attempting to swing himself over it when he stepped into the hopper. It is also the contention of appellee that appellant was not doing his work in the proper manner, in that he should have walked along by the side of the conveyor box where he could reach the oiling holes from the ground, and that when he came to the last hanger he should have reached it by stepping upon a ladder which was constructed as a part of the framework of the hopper, and that it was unnecessary for him to get on top of the conveyor box or to attempt to step over the hopper. Appellee introduced witnesses in support of this theory and also exhibited photographs purporting to show the structure as it existed at the time the injury occurred. Those photographs show the lad-

der in place on the side of the hopper as contended by appellee. There was also testimony to the effect that appellant was expressly forbidden to get on top of the conveyor box and that notices posted about the premises gave warning not to do so. On the other hand appellant testified that there were no notices posted about the premises warning against getting upon the conveyor box and that he had always performed his work of oiling the conveyor bearings by walking along the top of the box and that this was done under the supervision and frequently in the presence of the foreman who observed him doing the work. Appellant had been working for the company about eight months, and this conveyor had been in operation there for three months up to the time of the injury. Appellant denied that he undertook to swing himself across the top of the hopper, but stated that it was necessary in order to reach the last hanger for him to step over the hopper, and that the loose plank on top of the conveyor box next to the hopper turned under his foot and caused him to step into the hopper. He also denied that there was any ladder there at the time of his injury and stated positively that the photographs were incorrect in showing the presence of a ladder. There was, therefore, a sharp conflict in the testimony as to the manner in which appellant received his injuries, and in testing the correctness of the court's ruling in giving a peremptory instruction we must accept the testimony in the light most favorable to appellant's contention. In other words, we must assume that the jury would have accepted appellant's version of the matter, and if it was sufficient to support a verdict in his favor, the cause should have been submitted to the jury. Appellant's testimony is positive to the effect that his injury was caused by a defect in the covering of the conveyor box in that there was a loose plank next to the hopper and that this plank turned under his foot and precipitated him into the hopper which brought his foot in contact with the spiral conveyor. If there was a loose plank there, as contended by appellant, it constituted a defect in the

covering of the conveyor box, and the jury might have found that it constituted negligence on the part of appellee in failing to discover that defect and repair it. The box was comparatively new and generally in good condition, the fact that the plank which turned under appellant's foot was loose at the time, if the jury found that to be true, was sufficient to show that the defect was one which might have been discovered upon a reasonably diligent inspection. In other words, if that particular plank had not been nailed down at all, as is indicated by the testimony adduced by appellant, then the jury might have found it to have been a discoverable defect and that it constituted negligence on the part of the employer to fail to discover the defect and repair it. *St. L., I. M. & S. Ry. Co. v. Andrews*, 79 Ark. 437; *St. L., I. M. & S. Ry. Co. v. Webster*, 99 Ark. 265; *St. L., I. M. & S. Ry. Co. v. Ingram*, 124 Ark. 298.

If, as contended by appellant, he was doing the work in the method he had usually performed it, with the approval of his foreman, then appellee owed him the duty to exercise ordinary care to make the place reasonably safe.

These are questions which under the testimony should have been submitted to the jury, and it was also within the province of the jury to determine whether or not appellant was guilty of negligence in attempting to pass over the hopper to get to the last hanger. He testified that he could not reach the hanger any other way, as there was no ladder there, and that barriers placed on the side of the hopper extending into the door of the car prevented him from reaching the oil hole at this hanger from the ground.

We are of the opinion, therefore, that the trial court erred in taking the case from the jury.

Reversed and remanded for a new trial.



## BROOKS v. INTERNATIONAL SHOE COMPANY.

Opinion delivered February 11, 1918.

1. ACCOUNT—ACTION ON—ITEMIZED ACCOUNT.—Under Kirby's Digest, section 6128, where an action is brought on an account, the account must be itemized, and filed with the complaint, and where a detailed or itemized account is not filed, it is error for the court to overrule defendant's motion to make the account more specific by giving the items.
2. ACCOUNT—ANSWER—INSUFFICIENCY.—In an action on an account for goods sold and delivered, the answer of defendant is insufficient where it contains neither a denial of the purchase nor a plea of payment.
3. APPEAL AND ERROR—ACTION ON ACCOUNT—MOTION TO MAKE MORE SPECIFIC—EFFECT OF FILING DEFECTIVE ANSWER.—In an action on an account, the defendant filed a motion to make the account more specific, which the court erroneously overruled; defendant then filed a defective answer. *Held*, the filing of the defective answer was not a waiver of the erroneous ruling of the court in refusing to require that the account be made more definite.

Appeal from Marion Circuit Court; *John I. Worthington*, Judge; reversed.

*Allyn Smith*, for appellant.

1. The complaint was not sworn to by plaintiff. Kirby's Digest, § § 3151, 6121-6; 27 Cal. 295; 1 Denio (N. Y.) 662; 5 Ark. 32. See also 14 Ark. 237; 21 *Id.* 519; 24 *Id.* 410; 91 *Id.* 265.

2. No itemized account was filed. 19 Pa. Co. 641; 20 Weekly (Pa.) 21; 6 *Id.* 441; 60 S. E. 121. See also 1 Wait Ac. & Def. 190, § 3; Stephens Pl. 296; Kirby's Digest, § 6128; 172 S. W. 871.

3. The answer raised an issue. Kirby's Digest, § 6098; 6 Ark. 250; 50 *Id.* 466. The complaint failed to state a cause of action. 10 Kans. 131. The account was a lump or gross account and insufficient. Cases *supra*.

*J. H. Black*, for appellee.

1. The complaint was properly verified. Kirby's Digest, § 841; 20 S. W. 1069; 22 *Id.* 1101.

2. The account was sufficient; it was for *shoes*.

3. The motions are not made part of the record by bill of exceptions. 131 Ind. 468; 30 N. E. 703; 140 Ind. —; 39 N. E. 862; 67 Ark. 320; 54 *Id.* 463.

4. The answer was merely a plea of *nil debit* and insufficient. Kirby's Digest, § 6098; 35 Ark. 109; 35 *Id.* 104; 46 *Id.* 132; 60 *Id.* 606. See also Kirby's Digest, § 3151.

McCULLOCH, C. J. Appellee, a mercantile corporation, instituted this action against appellant in the circuit court of Marion County to recover on an account for merchandise sold and delivered, in the following form, and duly verified, filed with the complaint as an exhibit:

"E. Brooks, Rush, Ark.

To Statement rendered.

6/13/16 To Mdse.....	\$ 27.12
6/13 .....	735.75
6/24 .....	6.60
7/10 .....	5.19
9/11 .....	3.38
10/9 .....	1.87
10/16 .....	1.38
10/20 .....	3.65

Total .....\$784.94

6/9/16 By Cash.....	\$200.00
8/1 By Cash.....	33.70
12/8 By Cash.....	50.00
12/6 By Mdse.....	1.10—\$284.80

Balance due.....\$500.14

Interest ..... 15.00

Total .....\$515.14

(1) The affidavit verifying the account was made by one of the officers of the corporation, the vice president, who stated in the affidavit that the facts stated were within his personal knowledge. Appellant filed a

motion to require appellee to make the account or bill of particulars more specific by giving the items. In other words, the motion asked that the court require that an itemized account be filed. This motion was overruled whereupon appellant filed an answer as follows:

"Comes the defendant, E. Brooks, and for his answer to the complaint of the plaintiff herein denies that he is indebted to the plaintiff in the sum of \$515.14, for shoes purchased from the plaintiff as shown by Exhibit "A" and alleged in plaintiff's complaint, and denies that he is indebted to plaintiff in any other sum for shoes.

"Defendant, therefore, prays that the plaintiff take nothing by his action and that he have and recover of the plaintiff all costs by him paid out and expended."

Appellee then moved for a judgment on the pleadings, and the court held that the answer was insufficient and rendered judgment against appellant for the amount of the account. Appellant saved his exceptions and obtained an appeal to this court without filing motion for new trial. The statute on the subject of pleadings provides among other things as follows:

"If the action, counter-claim or set-off is founded on a note, bond, bill or other writing as evidence of indebtedness, the original, or a copy thereof, must be filed as part of the pleading, if in the power of the party to produce it. If not filed the reason thereof must be stated in the pleading. If upon an account, a copy thereof, must, in like manner, be filed with the pleading." Kirby's Digest, Sec. 6128.

The question for consideration in testing the correctness of the court's ruling in refusing to require a more detailed account to be filed involves an interpretation of the word "account" as used in the statute. It will be observed that the account filed by appellee did not purport to be an itemized account, but only to show the total amount of bills alleged to have been sold on the dates mentioned without giving a complete inventory of the goods sold.

The word "account" is said to have no inflexible technical meaning and is differently construed according to the connection in which it is used. However, in mercantile transactions it is invariably used in the sense of a detailed or itemized account. Bouvier defines the word as "A detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation." Substantially the same definition is given in 1 Corpus Juris, p. 596, where it is said: "To constitute an account, there must be a detailed statement of the various items, and there must be something which will furnish to the person having a right thereto information which will enable him to make some reasonable test of its accuracy and honesty." The California Supreme Court speaking on this subject, said: "The items must in all cases be set forth with as much particularity as the nature of the case will admit; but the law does not require impossibilities, and the party called upon to account is not subjected to the necessity of doing an impracticable thing. If the specifications are as precise and definite as he can make them, we do not see what more can be required." *Conner v. Hutchinson*, 17 Cal. 279. At common law an action on account was in the form of an action of debt or assumpsit and it was sufficient to describe the goods sold and delivered in general terms without giving the items, but statutes were passed in many States changing this rule and this was the obvious design of our statute which was copied literally from the Kentucky code. Mr. Bliss in his work on Code Pleadings (Sec. 298) after referring to the common law rule on the subject, calls attention to the fact that in many of the States "this want of certainty thus tolerated in debt and assumpsit is carefully guarded against" by the enactment of statutes changing the common law rule, and he mentions Arkansas as being one of the States where the change has been wrought by statute. In Sutherland on Code Pleading (Vol. 2, Sec. 2297) the rule is stated as follows:

"The items of the account furnished must be set forth with as much particularity as the nature of the case admits of. A bill of particulars is sufficiently specific if it apprises the opposite party of the evidence to be offered. If the bill is too general, the party receiving it should obtain an order for further particulars."

Measured by this rule the account filed by appellee with his complaint was insufficient, and appellant was entitled to have it made more definite and certain. The fact that invoices of the goods had been furnished at the time of the sale of the goods did not relieve the pleader from compliance with the statute by furnishing an itemized account. It may have been necessary to appellant's defense to have an itemized statement furnished. At least, he was entitled to have the statute complied with by his adversary before he was called upon to answer the complaint.

(2) The court erred, therefore, in overruling appellant's motion. The answer was insufficient, for it neither contained a denial of the purchase of the goods, nor pleaded payment. The language of the answer constituted merely a common law plea of *nil debit*, which is a mere conclusion of law to be drawn from the facts and does not constitute a sufficient answer under our code of practice. *Fain v. Goodwin*, 35 Ark. 109.

(3) The filing of the defective answer was not, however, a waiver of the erroneous ruling of the court in refusing to require that the account be made more definite.

It is insisted on the part of appellee that the error of the court in overruling appellant's motion has not been properly preserved in the record so as to bring the matter before us for review because there was no bill of exceptions. That would be true if there had been a trial of the cause upon merit, in which case it would have been necessary for appellant to file a motion for new trial and to preserve the ruling of the court in a bill of exceptions. *Rowland v. McGuire*, 67 Ark. 320; *Arkansas Central Railroad Co. v. State*, 72 Ark. 250. But this error ap-

pears upon the face of the record itself where it is shown that the court overruled the motion and rendered judgment by default on account of the insufficiency of the answer.

For the error indicated the judgment is reversed and the cause remanded for further proceedings.

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HUTTON v. McCLESKEY.

Opinion delivered February 11, 1918.

1. **CONSTITUTIONAL LIMITATIONS—REMISSION OF PENALTIES—POWER OF GOVERNOR.**—The power granted the Governor of the State by section 18, article 6, of the Constitution of 1874, to remit fines and forfeitures, as well as the power to grant reprieves, commutations and pardons, is confined to criminal and penal cases, after conviction or judgment.
2. **CONSTITUTIONAL LIMITATIONS—POWER OF THE GOVERNOR—REMISSION OF PENALTIES.**—The power of the Executive is limited to the extension of clemency to individuals under sentence or judgment for crime, penalty or forfeiture, and does not reach to granting of general amnesties, nor relief from civil penalties and forfeitures.
3. **CONSTITUTIONAL LIMITATIONS—POWERS OF GOVERNOR—TAXATION—REMISSION OF PENALTIES.**—The Governor is without authority to remit the penalty imposed by the act of 1917, page 1237, against delinquent property owners for failure to assess for taxation, and such delinquents can claim no relief under such proclamation.
4. **TAX COMMISSION—REMISSION OF PENALTY.**—The State Tax Commission is without authority to relieve delinquent property owners from the penalty imposed by the act of 1917, page 1237.

Appeal from Pulaski Circuit Court, Third Division;  
*G. W. Hendricks*, Judge; reversed.

*Rose, Hemingway, Cantrell, Loughborough & Miles*,  
for appellant.

1. The Governor had no power to pardon the penalty. The powers conferred by the Constitution are limited to criminal and penal cases and do not extend to liabilities under the revenue laws. Const. 1874, Art. 12, § 2; 26 Ark. 74-6-7; 117 Fed. 448; 13 Wall 128-139; 20 *Id.* 92; 211 Fed. 493.

2. The penalty under Act 1917 was not a fine nor forfeiture, and did not fall within the Governor's power to remit. 114 S. W. 255; 2 Bouvier, 2871; 117 Fed. 448, 454; 57 S. W. 713; 116 *Id.* 1197; 112 N. W. 585.

3. An executive act of amnesty is, in effect, a suspension of a State law, contrary to Sec. 12, Art. 2 of the Constitution. 7 Peters 150; 53 Fed. 238; 26 Ark. 74; 47 S. E. 403; 71 S. W. 52, 60; 13 Wall. 128, 148; 20 *Id.* 112.

*S. L. White and Will G. Akers*, for appellee.

1. The court will give a liberal construction to a grant of power to the end that justice and freedom from oppression may be uniformly attained. The Governor had power to remit the penalty. 6 Cranch, 87; 12 Wheaton, 213; 76 Ark. 197.

2. The effect is not a suspension of a law but a remission of a penalty. 15 Ark. 427, 431; 24 A. & E. Enc. L. (2d Ed.) 566; 41 Am. St. 663; 40 S. E. 142; 1 How. (Miss.) 596; 11 Ga. App. 564; 92 S. W. 191.

3. The power is not limited to penal cases where judgment has been pronounced by a court. The proclamation is not contrary to Art. 2, § 12, Const. 175 Fed. 238, 242; 15 Ark. 427, 430; 29 Cyc. 1560; 71 S. W. 52; 13 Wall. 128; 175 Fed. 238, 242.

4. The Tax Commission had power to make the order. Const. Art. 16, § 5; 127 Ark. 349; Acts 1909, No. 257, § 11, etc.

McCULLOCH, C. J. The General Assembly of 1917 enacted a statute changing the method of assessing property for taxation, and, among other changes in the law imposed a penalty of twenty-five per centum on the taxes of any delinquent property owner who failed to assess his property for taxation within the time and in manner prescribed by the statute. Acts of 1917, p. 1237.

On January 2, 1918, the Governor of the State issued a proclamation containing a recital that there had been many delinquencies in the assessment of taxes for the year 1917, which were unintentional and not wilful, and declaring a remission of all penalties for such delin-

quencies down to the sum of \$1.00, "but in no way interfering," so runs the language of the proclamation, "with the minimum penalty of \$1.00 to be paid to the township members for the listing of delinquents."

The plaintiff McCleskey is the owner of property in Pulaski County, and was among the list of delinquents. He made an offer to the collector to pay his taxes without penalty, and on refusal of that officer to accept the payment and give a full receipt without the payment of penalty, he instituted this action in the circuit court of Pulaski County to compel the collector, by mandamus, to do so.

The State Tax Commission also issued a general order undertaking to relieve delinquents from the payment of penalties and directing the tax collectors of the State to accept the payments for taxes from such delinquents without imposing the penalty, except the minimum of \$1.00.

No other question has been presented by counsel except the validity of the Governor's proclamation remitting the penalties and the order of the State Tax Commission attempting to relieve delinquents from payments of penalty.

The power of the executive to grant pardons for crimes and remissions of fines, penalties and forfeitures depends entirely upon a construction of the provision of the Constitution conferring that power, for it is derived solely from the Constitution, as the office does not carry with it inherently any such power. *Baldwin v. Scoggin*, 15 Ark. 427. The provision of the Constitution on that subject reads as follows:

"In all criminal and penal cases, except in those of treason and impeachment, the governor shall have power to grant reprieves, commutations of sentence and pardons after conviction; and to remit fines and forfeitures under such rules and regulations as shall be prescribed by law. In cases of treason he shall have power, by and with the advice and consent of the Senate, to grant reprieves and pardons; and he may, in the recess of the



Senate, respite the sentence until the adjournment of the next regular session of the General Assembly. He shall communicate to the General Assembly at every regular session each case of reprieve, commutation or pardon, with his reasons therefor, stating the name and crime of the convict, the sentence, its date and the date of the commutation, pardon or reprieve." Art. VI, Sec. 18.

Similar provisions were embodied in all of the Constitutions of the State except the Constitution of 1868, which was less restrictive and conferred somewhat broader powers than in the other Constitutions. The framers of the Constitution of 1874 returned, substantially, to the form employed in the older Constitutions, and there is little difference in those forms except in punctuation.

(1) Counsel for appellant contend that the power of remitting fines and forfeitures, as well as the power to grant reprieves, commutations and pardons, is confined to criminal and penal cases, after conviction or judgment, and we think that the contention of counsel in this respect is sound. The words "in all penal and criminal cases" and also the words "after conviction" qualify the other part of the sentence, and confine the whole power of the executive to such cases. The fact that a semicolon follows the word "conviction" instead of a comma, as in the similar clause in the Constitution of 1836, can not be treated as altering the meaning of the sentence. If we failed to so interpret the whole sentence, it would confine the concluding phrase, "under such rules and regulations as shall be prescribed by law" entirely to the preceding words concerning the remission of fines and forfeitures, and exclude the power of the law-makers to prescribe rules and regulations concerning reprieves, commutations and pardons—a power which was clearly recognized by this court in the case of *Baldwin v. Scoggin*, *supra*. In fact, the latter part of the sentence as separated by the semicolon is not grammatically complete when considered apart from the remainder of the sentence. Punctuation is generally the least reliable

guide to the true meaning of a sentence and should be given controlling effect only when other tests fail. The manifest design of the framers of the Constitution was to limit the power to pardon for crime and to remit fines and forfeitures to criminal and penal cases after conviction of crime or judgment for the imposition of fine or forfeiture, and not to allow its application to penalties and forfeitures civil, remedial and coercive in their nature. This is clearly indicated in another provision of the Constitution which expressly declares that "No power of suspending or setting aside the law or laws of the State shall ever be exercised except by the General Assembly." Art. II, Sec. 12.

(2) The effect of a general amnesty such as was attempted by the proclamation now under review would operate as a suspension of the law and come within the spirit, if not within the letter, of the inhibition of the Constitution just quoted, and when the two provisions of the Constitution are read together it is clear that it was intended to confine the power of the executive, with respect to the remission of fines and forfeitures, strictly to criminal and penal cases after judgment, and not to remedial and coercive penalties such as a penalty for non-assessments or non-payments of taxes. The power of the executive is, in other words, limited to the extension of clemency to individuals under sentence or judgment for crime, penalty or forfeiture, and does not reach to the granting of general amnesties, nor relief from civil penalties and forfeitures.

(3) We are clearly of the opinion, therefore, that the Governor exceeded his authority in attempting to remit the penalty imposed by statute against delinquent property owners for failure to assess for taxation, and that such delinquents can claim no relief under that proclamation.

(4) It is too plain for argument that the State Tax Commission possesses no such power as it attempted to exercise in this instance of relieving delinquent property owners from the penalty imposed by the statute. The

powers of the Tax Commission are limited entirely to the fixing of values, and do not extend to the relief of penalties imposed by statute.

The judgment of the circuit court is reversed and the cause remanded with directions to sustain the demurrer to the complaint.

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HORTON v. HUDDLESTON.

Opinion delivered February 11, 1918.

REAL ESTATE BROKERS — COMMISSIONS — PURCHASER INTRODUCED BY BROKER.—A. employed B. to sell certain land for him. B. introduced C. to A., and after some negotiations H. sold the land to C. B. sued A. for a commission. *Held*, while it is the rule that a broker may recover a commission, where the owner sells direct to a person whom the broker has introduced to him, that in this case where there was evidence that B. told A. that the trade with C. was off, and where the court properly instructed the jury as to the law, that a verdict in favor of B. would not be disturbed on appeal.

Appeal from Hempstead Circuit Court; *George R. Haynie*, Judge; affirmed.

*Etter & Monroe*, for appellant.

1. Appellant was the procuring cause of the sale. 84 Ark. 465. Appellee acted in bad faith. *Ib.* He was entitled to his commission. *Ib.*; 53 *Id.* 49; 81 *Id.* 96; 89 *Id.* 203; *Ib.* 207; 110 *Id.* 140.

2. The verdict is contrary to the evidence and the court erred in its instructions. 110 Ark. 140; 117 *Id.* 597; 89 *Id.* 208; 84 *Id.* 466.

*Jas. H. McCollum*, for appellee.

1. Failing to sell the land within the time limited by his agency, appellant is not entitled to a commission. 83 Ark. 202; 112 *Id.* 232, 566.

2. The verdict is sustained by the evidence. 126 Ark. 300.

3. The land sold for less than the price fixed. The jury were properly instructed. The verdict is conclusive.

## STATEMENT OF FACTS.

F. S. Horton sued H. L. Huddleston for a commission alleged to be due him for the sale of the latter's lands in Hempstead County, Arkansas. F. S. Horton was a real estate agent in the town of Hope, and on the 15th day of August, 1916, entered into a written contract with the defendant, Huddleston, whereby he was to have the agency for the sale of the defendant's farm for ninety days at a price of \$1,600.00 net to Huddleston. In a few days after that contract expired, R. A. Bradshaw called at the office of Horton to make inquiries about buying a farm. Horton called up Huddleston, and after some talking, Huddleston agreed to let him sell his land for \$1,800.00 net to him. Horton told Huddleston that he must protect him for \$200.00 commissions, and it was agreed that Huddleston should ask Bradshaw \$2,000.00 for his farm. Early on Thursday morning, about the 24th of November, 1916, Horton and Bradshaw went out to the farm of Huddleston to examine it.

According to the testimony of Horton, Bradshaw said that he must talk with his father-in-law, who was to furnish him the money, before completing any agreement for the purchase of the land. Horton further testified that during that afternoon Huddleston called him up and asked him what Bradshaw was going to do; that he told him that Bradshaw had not agreed to purchase the place at the price asked and advised Huddleston just to let him sweat awhile; that the next morning he again met Bradshaw and asked him what he had done; that Bradshaw said that he had not done anything; that on Saturday he talked to Huddleston and advised him to let Bradshaw alone; that he thought that Bradshaw was going to buy the place; that on the afternoon following, Huddleston came to him and told him to let the place alone as he had sold it; that he asked Huddleston to whom he had sold it, and Huddleston at first evaded him, but later admitted that he had sold it to Bradshaw.

According to the testimony of Huddleston, when they had gone over the place and Bradshaw and Horton were about to start back to town, he said to them, "I want to know today just what you are going to do, whether you are going to make the sale or not." Bradshaw said, "I will let you know today." Huddleston further testified that he called Horton up that night and asked him about it; that Horton told him that he had not made a sale of the land and that the sale was all off; that he met Horton again the next morning and Horton told him that the sale was all off; that relying on this statement, on the following Monday he made a contract with Bradshaw himself to sell him the place for \$1,750.00; that he did this because Horton had told him that the deal was off as far as Bradshaw was concerned and that he thought he had the right to deal with Bradshaw himself for any price they might agree upon. Horton denied that he had told Huddleston that the deal was off and stated that Huddleston understood that he was still negotiating with Bradshaw. In this respect Horton was corroborated by Bradshaw.

The jury returned a verdict for the defendant and from the judgment rendered, the plaintiff has appealed.

HART, J., (after stating the facts). In the case of *Scott v. Patterson & Parker*, 53 Ark. 49, the court held that if a real estate agent employed to sell land introduces a purchaser to the seller, and through such introduction a sale is effected, he is entitled to his commission although the sale is made by the owner.

According to the testimony of the plaintiff, he was employed by Huddleston to sell his farm and was the procuring cause of the sale. He acted in good faith throughout the transaction and while negotiations were still pending between him and Bradshaw, Huddleston sold the land to Bradshaw. This theory of the case was fully and fairly submitted to the jury upon appropriate instructions. Counsel for the plaintiff complain that the court refused to give certain instructions asked for by them. The principles of law contained in these in-

structions were fully covered in the instructions given by the court upon its own motion, and it is well settled in this State that the court need not repeat instructions upon the same point. Therefore it is not necessary to set out these instructions nor to discuss them in detail.

The right of the defendant to a verdict was made to depend upon the question of whether or not the negotiations between Horton and Bradshaw had ended when Huddleston made the sale to Bradshaw. It will be remembered that Huddleston stated that after Bradshaw and Horton had gone over the land he told Bradshaw, in the presence of Horton, that the matter would have to be settled that day and that they acquiesced in this arrangement; that he called up Horton that night and asked him about the matter; that Horton told him that the trade was all off; that Horton told him practically the same thing the next morning. The court in express terms limited the right of Huddleston to a verdict to the truth or falsity of his testimony in this respect. There was an irreconcilable conflict in the testimony of the parties. Their respective theories were fully and fairly submitted to the jury and the judgment will therefore be affirmed.

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WINTER v. LEWIS.

Opinion delivered February 11, 1918.

**CONTRACTS—ILLEGAL CONSIDERATION—CONCEALING A CRIME OR STIFLING A PROSECUTION.**—Any contract, the consideration of which, in whole or in part, is to conceal a crime or to stifle a prosecution therefor, is necessarily repugnant to public policy, and for that reason is illegal and void.

Appeal from Pulaski Circuit Court, Second Division;  
*Guy Fulk*, Judge; affirmed.

*Hal L. Norwood*, for appellant.

1. Appellant is not a volunteer. If his testimony is true, and it is, appellee is clearly liable. If the agreement between Lewis and Ed Weaver is void, the question

of whether appellant's relationship to the transaction would prevent a recovery, is one of fact to be submitted to a jury under proper instructions. It was error to direct a verdict. Winter was not a party to any contract to conceal a crime or stop a prosecution therefor. He knew nothing of the gambling debt or why the checks were given.

*Geo. A. McConnell*, for appellee.

1. Appellant was a mere "go-between." The check really belonged Weaver & Co. Appellee owed appellant nothing. Appellant was a mere volunteer. 40 Cyc. 222; 2 Elliott on Cont. 632; 23 L. R. A. 120.

2. He had no right to sue. 57 Ark. Law Rep. 219.

3. The suit grows out of a gambling transaction and a contract to dismiss and suppress a criminal prosecution and can not be maintained. Kirby's Digest, § 3690; 80 Ark. 326; 98 *Id.* 274; 20 L. R. A. (N. S.) 484; Daniel on Neg. Inst., § 196a; 80 Ia. 738.

HART, J. S. Winter sued Jas. K. Lewis in the Municipal Court of Little Rock, second division, to recover the sum of \$53.40 alleged to be due upon a check given him by the defendant. The plaintiff recovered judgment against the defendant for the amount sued for and the defendant appealed to the circuit court. There the court directed a verdict in favor of the defendant and from the judgment rendered the plaintiff has appealed.

Fred K. Lewis, a young man about nineteen years of age, at the time, was working in Fort Smith, Arkansas, for the Underwood Typewriter Company. He went into a back room at Weaver & Company's and got into a crap game in which Edwin Weaver was the banker. After losing about twelve or thirteen dollars which he had brought with him, he induced Edwin Weaver to cash two checks in his favor for ten and fifteen dollars respectively. He also lost the amount of these two checks in the game. Fred K. Lewis failed to pay the checks and Edwin Weaver had him arrested before a justice of the peace on two warrants for obtaining money under false pre-

tenses. The costs in the two cases amounted to \$23.40. It was agreed that Fred K. Lewis would pay to Edwin Weaver the sum of \$48.40, being the amount of the two checks and the costs in the two cases in consideration that Edwin Weaver would cause the dismissal of the two criminal cases against him and not voluntarily appear further in any criminal proceedings against him in regard to the matter. This was done. As security for the performance of the contract on the part of Fred K. Lewis, he delivered to Edwin Weaver an Underwood Typewriter which it was agreed should remain in the possession of Weaver until the said sum of \$48.40 was paid. A written contract to this effect was entered into. The typewriter in question belonged to the Underwood Typewriter Company and was in the possession of Fred K. Lewis for use as a sample in selling the machines. Fred K. Lewis failed to redeem the machine during the time agreed upon in the contract, and being unable to redeem the machine when called upon for a settlement by the company, his father undertook to adjust the affair. S. Winter acted for Weaver & Company and J. K. Lewis for his son. J. K. Lewis gave Winter a check as agent for Weaver & Company for \$48.40, the amount of his son's indebtedness as above stated. In consideration of this check the typewriter was delivered to J. K. Lewis and he returned it to the Underwood Typewriter Company for his son. J. K. Lewis says that he then learned for the first time how his son had been treated in the matter by Weaver & Company and on that account notified his bank not to pay the check. Be that as it may, he allowed the check to go to protest. Winter says that he paid the amount of the check and the protest fees of \$4.90 to Weaver & Company. Hence this suit.

It is first sought by counsel for the defendant to uphold the judgment in his favor on the ground that the check was payable to Winter and that Winter was not the proper party to bring the suit. The undisputed facts show that the check was made payable to Winter as agent for Weaver & Company. Therefore the contract



being made in his own name for the benefit of his principal, Winter had a right to bring the action. Kirby's Digest, 6002, and *Shelby v. Burrow*, 76 Ark. 558. The court, however, was right in directing a verdict in favor of the defendant. The undisputed evidence shows that Fred K. Lewis became indebted to Edwin Weaver on account of a gambling transaction in the sum of \$25.00. Weaver had him arrested for obtaining money under false pretenses in two cases. In consideration of the dismissal of the charges against him, Fred K. Lewis agreed to pay Weaver \$48.40, being the amount of the two checks drawn in his favor by Lewis and the costs of the prosecution. He delivered to Edwin Weaver an Underwood Typewriter to be held by him until the payment of the indebtedness. Winter knew all about this transaction. The check sued on in this case was given by the defendant, who was the father of the young man, in order to redeem the typewriter. It is well settled in this State that any contract the consideration of which, in whole or in part, is to conceal a crime or to stifle a prosecution therefor, is necessarily repugnant to public policy, and, for that reason, is illegal and void. *Goodrum v. Merchants & Planters Bank*, 102 Ark. 326; *Beal & Doyle Dry Goods Co. v. Barton*, 80 Ark. 326, and *Johnson v. Graham Brothers Co.*, 98 Ark. 274.

It follows that the court was right in directing a verdict for the defendant, and the judgment will be affirmed.

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#### LASKER-MORRIS BANK & TRUST COMPANY v. GANS.

Opinion delivered February 11, 1918.

1. TRUSTS—RESULTING TRUSTS—LANDS PURCHASED WITH ANOTHER'S MONEY.—A. and B. furnished C. with money with which to buy lands for their joint benefit. C. took the money and bought certain lands, the title to which was taken in his name individually. *Held*, a trust results by implication of law for the benefit of A. and B. to the extent of the money furnished.
2. TRUSTS—RESULTING TRUST.—A writing declared as follows: "June 6, 1900. The following property deed to me by the Co-operative Real Estate Company of Little Rock, is held by me in trust for

Gertie Gans, Sol Gans and A. M. Heiseman as their interests may appear. \* \* \* The writing then describes certain lands and is signed "A. M. Heiseman." *Held*, the writing does not create an express trust, but it is evidentiary of the facts out of which a resulting trust arises.

3. TRUSTS—RESULTING TRUST—HOW CREATED—PURCHASE OF LAND—SUBSEQUENT DECLARATION—ORAL PROOF.—Transactions between the parties subsequent to the purchase of certain lands can not create a resulting trust, but if such a trust arises out of the purchase of the land, its character as a resulting trust is not altered by a writing subsequently executed, which acknowledges the existence of the trust; nor does the fact that the writing acknowledges the existence of a trust, change the character of the transaction from a resulting trust, which may be established by parol, to an express trust, which is within the statute of frauds.
4. TRUSTS—RESULTING TRUSTS—PROOF.—The proof held to establish the existence of a resulting trust in certain lands purchased by deceased with money furnished by himself and others.
5. TRUSTS—RESULTING TRUSTS—LIMITATIONS AND LACHES.—C. purchased property with money furnished by himself and A. and B. It was held that he held title to the property for the three parties as trustee, under a resulting trust. No accounting was had of the trust, from the date of the purchase of the land until C.'s death, a period of fifteen years. *Held*, under the evidence that an action by A. and B. was not barred by either limitations or laches.
6. ADMINISTRATION—DEMAND AGAINST ESTATE—AFFDAVIT.—In an action against an executor for an accounting of a trust estate, of which deceased was trustee, *held*, the affidavit attached to the complaint was a sufficient compliance with the law.
7. TRUSTS—RESULTING TRUSTS—INTEREST.—The estate of a person who held certain lands as trustee under a resulting trust is liable for interest on money collected by the trustee arising from the sale of the lands from the date of the sale.
8. EVIDENCE—ADMINISTRATION—TRANSACTIONS WITH DECEASED.—Testimony that witness and deceased occupied a position of unre-served and unlimited trust and confidence, relates to a relationship and not a transaction, and is not incompetent under section 2 of the schedule to the Constitution.
9. APPEAL AND ERROR—CHANCERY APPEAL—TRIAL DE NOVO—INCOMPETENT TESTIMONY.—Chancery appeals are tried *de novo*, and it is the duty of this court, as well as that of the chancellor, to disregard incompetent testimony, and a cause will be affirmed, when the chancellor's finding is in accordance with the preponderance of the testimony, after the incompetent testimony is disregarded.

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; affirmed.

*Morris M. & Louis M. Cohn*, for appellant.

The statute of frauds applies. Parol testimony to establish a trust in real estate is not admissible. Kirby & Castle's Digest, § 3397. The written document does not fulfil the requirements of the statute. It fails to show what the trust was, without recourse to parol evidence. Browne Stat. Frauds, § 108; 16 Ark. 364; 28 Enc. of Law, 913; 76 Ark. 237.

2. Sol Gans' testimony was inadmissible as to transactions with the deceased. 30 Ark. 285; 79 *Id.* 414; 80 *Id.* 277; 79 *Id.* 69; 82 *Id.* 163; 83 *Id.* 210; 108 *Id.* 171, 179.

3. The complaint was not properly sworn to, as the statute requires. 21 Ark. 519; 30 *Id.* 756; 48 *Id.* 360; *Ib.* 304; 66 *Id.* 327; 69 *Id.* 62; 105 *Id.* 95, 98; 105 *Id.* 95-6.

4. The doctrine of laches applies. 79 Ark. 570-5; 63 *Id.* 405. It is applicable to trusts like this. 84 Ark. 61; 110 *Id.* 389; 18 A. & E. Enc. Law, 119-120; 114 Ark. 359, 365; 95 S. E. 606, 608; 62 W. Va. 602.

5. Interest should not have been allowed. 44 S. W. 442.

6. There was no resulting trust. 29 Ark. 612; 30 *Id.* 230; 40 *Id.* 62; 79 *Id.* 164.

*John M. Moore, W. B. Smith, J. Merrick Moore and H. M. Trieber*, for appellee.

1. The statute of frauds can not avail as a defense. It was not pleaded nor was any demurrer interposed. 32 Ark. 97; 96 *Id.* 184; 105 *Id.* 638. But if pleaded it could not avail. This is not an express trust, but a resulting trust and need not be evidenced by a writing. 70 Ark. 145; 98 *Id.* 452; 39 Cyc. 108. Gans paid his part of the whole of the note to the bank. 5 Atl. 190.

2. The statute of limitations is no defense. 16 Ark. 122; 4 Blackf. 81. It does not begin to run until the trustee openly repudiates his trust and begins to hold adversely. 71 Ark. 164; 67 *Id.* 340; Perry on Trusts (6th Ed.), § 863; 85 Wis. 332; 17 R. C. L. § 163, p. 796; 74 N.

E. 933; 2 Perry on Trusts (6th Ed.), 1418; 17 R. C. L. § 162, p. 795.

3. The doctrine of laches can not operate to defeat the claim. 103 Ark. 251; 82 *Id.* 367; 5 Pom. Eq. Jur. (3d Ed.), § 21; 2 Perry on Trusts (6th Ed.), § 850; 86 N. W. 894.

4. Sol Gans' testimony was competent. 115 Ark. 538. It did not go to any *transaction* with Heiseman, but only to the *relation* of confidence and trust.

5. Interest was properly allowed.

6. The statute was complied with as to verification of the complaint. 54 Ark. Law Rep. 493.

#### STATEMENT OF FACTS.

Appellees sued appellant, as administrator of the estate of A. M. Heiseman, deceased, in the chancery court of Pulaski County, and, for their cause of action, alleged the following facts: That, on August 19, 1899, the Co-Operative Real Estate Company, a corporation, conveyed certain lands, owned by it, described in the declaration of trust set out below to A. M. Heiseman, for the consideration of \$6,500.00, of which sum Sol Gans furnished 22.47 per cent., and Gertie Gans furnished 21.35 per cent., and A. M. Heiseman the remainder, and subsequently Heiseman executed to the Gans a declaration of trust as follows:

"June 6, 1900. The following property deed to me by the Co-Operative Real Estate Company of the City of Little Rock is held by me in trust for Gertie Gans, Sol Gans and A. M. Heiseman as their interest may appear: Lots 9 and 10, block 8, Centennial Addition; lot 7 and S $\frac{1}{2}$  of lot 8, block 1, Wright's Addition; lots 5, 6, 7, 8, block 7, Adams' Addition; E $\frac{1}{2}$  NE SW Sec. 5, Twp. 1 N. R. 12 W. twenty acres, all being in Pulaski County, Arkansas.

"(Signed) A. M. Heiseman."

That thereafter the land in Section 5 was platted into blocks and lots and called "Heiseman's Addition to the City of Little Rock." That a number of these lots, to-

gether with other lots not included in the said addition, but embraced in said trust, were sold, and Heiseman collected the money realized from these sales, but never accounted to the Gans for their proportionate part. The Union Trust Company was also made party defendant, and as against that company it was prayed that it be required to show what interest it had or claimed in the unsold lots. There was a prayer for an accounting, and for partition of the unsold lots. The complaint contained the following verification:

“Comes Gus Gans and says that he is the agent for the plaintiffs, Sol Gans and Gertie Gans, and authorized on their behalf to make this affidavit; that he is familiar with the matters and things set out in the above and foregoing complaint, and that the allegations thereof are true.

“(Signed) Gus Gans.”

The administrator answered, and denied the existence of the trust, or any indebtedness to the plaintiffs, and pleaded the bar of the statute of limitations, and also laches. The Union Trust Company filed an answer and cross-bill, in which it alleged that, in consideration of certain sums of money which it had advanced Heiseman, that Heiseman had executed to it a deed for the land, which was divided into lots, and that, pursuant to a contract to that effect, it had undertaken the sale of these lots for an agreed commission, and, after selling a number of these lots, there remained due it, including interest, the sum of \$6,130.40. The unsold lots were ordered sold in satisfaction of that indebtedness, and, at a sale for that purpose, the Union Trust Company bid for all of the unsold lots the amount of its debt. This sale has been approved and confirmed, and that debt thereby extinguished, and no one complains of that action.

In behalf of plaintiffs, T. R. Fox testified that he was intimately acquainted with Heiseman and had worked with him for many years for Gans & Sons, and that he was familiar with his handwriting, and identified the minutes of the meeting of the stockholders of the real

estate company written by Heiseman, in which there appeared a report, written by Heiseman, showing an indebtedness of the real estate company amounting to \$6,604.03, and the passage of a resolution directing the board of directors to sell the property of that company, and to terminate its affairs. The minutes showed the amount of stock owned by the stockholders present, the recital being that G. M. (Gertie) Gans owned 57 shares, and Sol Gans 60 shares, and Heiseman 150 shares, and the ownership of the remaining shares of stock was also set out. The witness also identified as the writing of Heiseman the declaration of trust set out above.

Sol Gans testified that the stockholders of the real estate company became dissatisfied, and it was determined to wind up its affairs, and Heiseman suggested that they purchase its assets, and that money for this purpose was borrowed from the German Bank on the joint note of himself and Heiseman. This note was renewed once or twice, but was finally paid, and the witness testified that his recollection is that he not only paid the part due by himself and Mrs. Gans, his sister-in-law, but that he paid the entire note. No one was interested in the purchase of the land of the real estate company except himself and his sister-in-law and Heiseman, and the declaration of trust set out above was executed to evidence the interest owned by witness and Mrs. Gans. Witness testified that Heiseman was employed by him for 24 or 25 years, during which time Heiseman had charge of a great many business transactions for him, and that the relationship between them was one of unreserved trust and confidence, and that Heiseman handled all the financial transactions of the firm which employed him and was, in all respects, Gans' confidential man. He detailed the transaction with the bank by means of which the money was secured to purchase the land and that in this transaction with the bank he acted for himself and Mrs. Gans. Witness further testified that Heiseman quit his employment before his death, but that the trust was

never, in any manner, repudiated. Objection was made to the competency of all this testimony.

The bookkeeper of the Union Trust Company testified in regard to the advances made Heiseman on the land and, by stipulation, it was shown that Heiseman had received \$7,300.00 from the other property described in the declaration of trust, from all of which it appeared that, if a trust in fact existed, as recited in the declaration of trust, Heiseman was indebted to Sol Gans in the sum of \$5,572.98, plus \$1,470.76 interest, and in favor of Mrs. Gans in the sum of \$5,066.80, plus \$1,379.45 interest, and a decree for that amount of money was rendered in favor of the plaintiffs respectively, and the administrator has duly appealed.

In its answer, and on this appeal, the administrator disputes the existence of a trust or any indebtedness, and the sufficiency and the competency of the testimony by which that fact was sought to be established; and further contends, if there was any indebtedness, same is barred by limitation and laches; and also that the claim was never properly authenticated, and that, in any event, interest should not be allowed; and it is also urged that the writing exhibited is insufficient under the statute of frauds to support a finding that a trust exists. Other facts will be stated in the opinion.

SMITH, J., (after stating the facts). (1-2) We think the statute of frauds does not apply here. It is not sought to enforce an express trust. The suit was brought upon the theory that the Gans had agreed to furnish, and had, in fact, furnished, part, if not all, of the consideration used in the purchase of the land, and had done so under the agreement that the purchase should inure to the benefit of the persons so furnishing the purchase money in proportion to the amount furnished. The writing offered in evidence does not create an express trust; but it is evidentiary of the facts out of which a resulting trust arises. Section 3667 Kirby's Digest. The Gans, by the execution of the note to the bank, furnished money

to Heiseman with which to buy the lands for their joint benefit. Heiseman took the money so furnished and bought lands the title to which was taken in his name individually. A trust results by implication of law for their benefit to the extent of the money furnished. *Grayson v. Bowlin*, 70 Ark. 145; *Foster v. Treadway*, 98 Ark. 452; *Jones v. Jones*, 118 Ark. 146; *Keith v. Wheeler*, 105 Ark. 323, and cases there cited.

(3) Nor does the fact that the writing set out acknowledges the existence of a trust, change the character of the transaction from a resulting trust, which may be established by parol, to an express trust, which is within the statute of frauds. Transactions between the parties subsequent to the purchase of the land could not create a resulting trust; but if such a trust arises out of the purchase of the land, its character as a resulting trust is not altered by a writing subsequently executed which acknowledges the existence of the trust. *Grayson v. Bowlin*, 70 Ark. 145.

(4) Appellant strongly argues that no trust ever existed, and presses upon our attention the fact that the land was purchased in 1899, and that there were many transactions in regard to it which the Gans never questioned; that it was sold to the Union Trust Company by Heiseman and divided into lots, and that during many years no settlement of the trust was had, and that no accounting was asked until after Heiseman's death in 1915. It appears, however, that the deed from the real estate company to Heiseman was executed on the 19th of August, 1899, for a recited consideration of \$6,600.00, and Gans produced at the trial the note of himself and Heiseman for that sum of money and which also was dated on the 19th of August, 1899, this being the note referred to above. This testimony, and the other testimony set out above, we think, supports the finding made by the court below that Heiseman took the title to the property as trustee for himself and for the Gans, who united with him in furnishing the purchase money.



(5) Does the statute of limitations apply, and are the plaintiffs barred from asserting their rights by laches? It is true a great many years expired here between the time of the creation of the trust and the date when the Gans asked for an accounting. But the testimony shows that there was never any repudiation of the trust and that the confidence of the Gans in Heiseman was unreserved; that there were many and large transactions between them; and, as there was no repudiation of the trust, and no change in the situation of the parties resulting from inaction, we conclude that the cause of action was not barred, either by limitation or laches.

(6) The form of affidavit attached to the complaint which we set out above, does not conform to the requirements of Section 114 of Kirby's Digest, which prescribes the form of affidavit to be made to a demand against the estate of a deceased person. It appears, however, from the pleadings in the cause, that a properly authenticated and verified statement of the account had been presented to the administrator in apt time, and that the same had been disallowed, and that the affidavit attached to these demands fully complied with Section 114 of Kirby's Digest. This sufficiently complied with the law.

(7) We are also of the opinion that interest was properly allowed on this demand. The court computed the interest from the date of each of these sales, the result of which is to charge Heiseman with the interest on the money during the time it was in his possession. The argument that a great length of time was permitted to expire before any demand was made for a settlement, has more force when made in support of the plea of laches than it has when made against the allowance of interest. If the estate of Heiseman should be held for this money at all, it should also be held for the interest which accrued from the date of the sales, at which time, as a matter of law, it was the duty of Heiseman to account to his associates for their *pro rata* share.

(8-9) It is finally insisted that much of the testimony of Sol Gans is incompetent, because it involved

transactions with the deceased Heiseman in a suit against his administrator, and thereby offends against the inhibition of Section 2 of the Schedule to the Constitution prohibiting such evidence. The testimony that the relation between witness and Heiseman was one of unre-served and unlimited trust and confidence related to a relationship, rather than to a transaction, and is not, therefore, incompetent. The testimony of Gans, that Heiseman suggested to him, at a meeting of the stock-holders of the Co-Operative Real Estate Company, that they purchase the assets of that corporation, was incom-petent, because it does relate to a transaction between the witness and the administrator's intestate. But we try chancery cases *de novo*, and it is our duty as well as that of the chancellor to disregard incompetent testimony; and, when we have disregarded this incompetent testi-mony, we are of the opinion that the finding of the chan-cellor is in accordance with the preponderance of the evi-dence. It was competent for the witness to produce the note which he and Heiseman executed to the bank; and it was competent for him to state that he paid the note, as this testimony relates to a transaction with the bank. From the note itself, it appears that it was of even date with the deed to Heiseman, and covered the consideration recited in the deed. We think this testimony, and the declaration of trust executed by Heiseman in his own handwriting, warranted the court in finding that Heise-man and the Gans had jointly furnished the purchase money with which the land was acquired and that it was purchased for their joint benefit, in proportion to the part furnished, and that, therefore, a trust resulted as de-clared by the court. The decree of the court below is therefore affirmed.

## HEMPSTEAD COUNTY v. HOPE BRIDGE COMPANY.

Opinion delivered February 11, 1918.

1. APPEALS FROM COUNTY COURT—ALLOWANCE OF CLAIM—RIGHT OF JURY TRIAL IN CIRCUIT COURT.—On appeal to the circuit court from an order of the county court, disallowing a claim against the county, it is improper to submit the case to the jury.
2. COUNTY COURTS—CLAIM AGAINST COUNTY—ALLOWANCE AND DISALLOWANCE.—A bridge company, appellee, furnished certain bridges to the appellant county, and filed a claim therefor. The county court allowed some of the claims and marked certain others for investigation, without allowing or disallowing them, and allowed the claim "as amended," *held*, parol evidence was admissible to show what the account "as amended" was, and to explain the meaning of the marginal notations of the county judge.
3. COUNTY COURTS—ALLOWANCE OF CLAIMS—SEPARATE ITEMS.—Where a claim was presented to the county court for certain bridges furnished to the county, the county court may pass upon the items separately, and allow or disallow them separately.

Appeal from Hempstead Circuit Court; *George R. Haynie*, Judge; affirmed.

*Tillman B. Parks*, Prosecuting Attorney, and *Etter & Monroe*, for appellant.

1. The claim for the two items was disallowed, the time for appeal has expired and the judgment is final.

The cause should have been submitted to a jury.

The record is the best evidence in the case. The intention of the county judge to allow or disallow was a question of fact to be tried by jury. 57 Ark. 579; 109 *Id.* 537.

2. Where there is any evidence to establish a fact or issue, it is error to take the case from the jury. 89 Ark. 372; 63 *Id.* 94; 76 *Id.* 556; 36 *Id.* 451; 35 *Id.* 146; 62 *Id.* 63; 84 *Id.* 57.

In determining on appeal the correctness of a trial court's action in directing a verdict the rule is to take that view of the evidence most favorable to the party against whom the verdict is directed. 89 Ark. 372; 73 *Id.* 561; 76 *Id.* 520.

The record is the best evidence of what was done or intended. Parol evidence to prove the proceedings of

a court of record is inadmissible. 87 Ark. 108. A judgment of a court of record should be proved by the original record. 11 Ark. 466; 25 *Id.* 424.

*James H. McCollum*, for appellee.

1. The two items were not disallowed. They were simply postponed for future action. Such a custom was shown. 115 Ark. 130.

2. The finding of the court is supported by a clear preponderance of the evidence and will not be disturbed. 96 Ark. 606; 104 *Id.* 154; 125 *Id.* 136.

3. No objections or exceptions were saved and made in the motion for new trial. The objections were waived. 79 Ark. 176; 94 *Id.* 147; 108 *Id.* 425; 116 *Id.* 307; 117 *Id.* 198.

4. The trial was by consent of parties. 112 Ark. 57; 125 *Id.* 305; 126 *Id.* 354; 127 *Id.* 58.

5. A jury trial was not demanded. 44 Ark. 202.

6. This was not a jury case. It originated in the county court. 26 Ark. 281; 29 *Id.* 370; 32 *Id.* 553; 40 *Id.* 290; 50 *Id.* 266; 52 *Id.* 445.

7. The county is clearly liable for the two bridges. 38 Ark. 557.

SMITH, J. H. L. B'Shers was county judge of Hempstead County in 1914, and during that year built a large number of bridges in that county. A number of these bridges were furnished by the Hope Bridge Company, and that company filed for allowance the following claim against the county:

“May 18/14 One 60-ft. bridge by Cros-	
noe .....	\$ 568.50
May 23/14 One 30-ft. bridge shipped	
to Ozan .....	216.00
May 23/14 One 20-ft. bridge shipped	
to Ozan .....	91.84
May 28/14 One 300-ft. bridge, \$216.00,	
with legs, \$44.00 .....	260.00 x off
June 18/14 One 17-ft. 6-inch, \$81.20,	
legs \$44.00 .....	125.20 x off

June 29/14 One 60-foot, \$568.50, 20-ft.,	
\$91.84, legs, \$23.25.....	\$ 683.59
	<hr/>
	\$1,945.13
Off .....	385.20
	<hr/>
	\$1,559.93."

Opposite the bridges for which the sums of \$260.00 and \$125.20, respectively, were charged, the county judge made the notation, "x off." These two bridges total the sum of \$385.20, and that sum was deducted from the account, and the docket of the judge showed that the claim was "allowed as amended," and the following entry was made on the county court record:

"This day the court examined the claim herein filed of Hope Bridge Company for one 60-foot bridge, one 30-foot bridge, 2 20-foot bridges, and one 60-foot bridge, which is duly verified and allowed by the court as amended in the sum of fifteen hundred fifty-nine and 93/100 dollars (\$1,559.93) and the clerk of this court is ordered to draw his warrant on the county treasurer for the said sum in favor of said firm payable out of the appropriations for bridges."

No further action was taken in regard to this claim until after the expiration of the term of Judge B'Shers. Later another account was filed, which included these two items, and they were disallowed by the county court, and in apt time an appeal was prosecuted from the order of disallowance to the circuit court, and upon a trial there judgment was rendered in favor of the bridge company.

A motion was filed in behalf of the county to dismiss the appeal upon the ground that the claim had been disallowed at the July, 1914, term of the county court, and no appeal had been prosecuted within the time limited by law. This motion was not disposed of specifically, but the judgment of the court, in effect, disposed of it.

There appears to be no question but that the bridges were furnished to, and were received by, the county, and were in use at the time of the trial. The controlling

question is whether the claims were disallowed by the county court at its July, 1914, term.

It is first insisted that this issue should have been tried on appeal before a jury. But a jury could not have been demanded in the county court originally, and it was not proper, therefore, to submit the case to a jury in the circuit court on appeal. *State v. Johnson*, 26 Ark. 281; *Swope v. Ross*, 29 Ark. 370; *Govan v. Jackson*, 32 Ark. 553; *Williams v. Citizens*, 40 Ark. 290; *Wheat v. Smith*, 50 Ark. 266; *Woolum v. Kelton*, 52 Ark. 445; *State v. Churchill*, 48 Ark. 426, 436; *Kirkland v. State*, 72 Ark. 171, 177; *St. L., I. M. & S. Ry. Co. v. State*, 99 Ark. 1, 16. Moreover, the record recites that the cause was heard by the court by consent of the parties.

Upon the hearing of the cause it was shown that the county judge had the practice, when examining accounts against the county which consisted of a number of items, to allow those items about which he was satisfied, and to pass over, for further examination, items about which he was in doubt; and Judge B'Shers testified that he had not disallowed the items in question, but had marked them off for further investigation.

It is insisted that the judgment speaks for itself, and that it is not subject to parol explanation. The judgment, however, does not disallow the items in question. It does allow the account *as amended*, and parol evidence was admissible to show what the account as amended was, and this was done by showing the meaning of the marginal notations made upon the account by the county judge. The notations are ambiguous, and no rule of evidence was violated in explaining this ambiguity. This explanation makes it appear that, when considered by the county court, the items had been marked off the account, and the account as passed upon by the court was one for the sum of \$1,559.93, for which sum it was allowed.

We perceive no reason why the court did not have the jurisdiction to pass upon these items separately and to allow or to disallow them separately, as they repre-

sented different bridges furnished at different times. *Jennings v. Fort Smith District of Sebastian County*, 115 Ark. 130.

The court amended the account so that it included only the items concerning which it was then advised and upon which it was then prepared to pass judgment, and we are of the opinion that this action cannot be treated as a judgment of disallowance from which an appeal must be prosecuted. Under the circumstances an appeal would have been both premature and unnecessary.

Judgment affirmed.

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BAINÉ v. STATE.

Opinion delivered February 11, 1918.

1. HOMICIDE—CONVICTION—REDUCTION OF DEGREE.—There must be both provocation and passion to reduce a homicide to manslaughter which would otherwise be murder; and, while a man who had caught his wife *flagrante delicto* might be so moved by passion and rage as that the impulse to kill her partner in crime, or the wife herself, would be irresistible, still this, in any case, would be a question for the jury, and not one of law for the court.
2. APPEAL AND ERROR—OBJECTIONS TO INSTRUCTIONS.—Appellant must object to the giving of an instruction, and must save an exception to the ruling of the court, as well as assign the error in the motion for a new trial.
3. APPEAL AND ERROR—MULTIPLICATION OF INSTRUCTIONS.—The trial court need not multiply instructions on the same issue.
4. TRIAL—ARGUMENT OF INSTRUCTIONS.—In argument, an attorney may argue the law, to the jury, as declared in the instructions given by the court.

Appeal from Pulaski Circuit Court, First Division;  
*J. W. Wade*, Judge; affirmed.

*L. C. Maloney*, for appellant.

1. The verdict is against the preponderance of the evidence. Roseby's evidence was not corroborated. The affray was caused by Roseby's improper conduct and his story is improbable, to say the least. No malice or premeditation was shown and the evidence was never suffi-

cient to show anything more than involuntary manslaughter, if that.

2. Defendant was entitled to the benefit of the law of self-defense and reasonable doubt. The burden was on the State and never shifted to defendant. 71 Ark. 459.

3. The court erred in its instructions as to homicide. Kirby's Digest, § 1765; 1 Wharton on Cr. Law, 488, 489, 491; 67 Ark. 600. The instructions were confusing and misleading.

4. The remarks of the prosecuting attorney were prejudicial.

*John D. Arbuckle*, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The evidence sustains the verdict. 92 Ark. 200; 31 *Id.* 196; 95 *Id.* 172; 101 *Id.* 51.

2. It was not necessary to prove murder in the first degree since the conviction was only for manslaughter.

3. The jury was fully instructed as to the burden of proof, and it was not error to refuse further instructions on that point. 103 Ark. 352; 101 *Id.* 569.

4. It was not error to instruct in the language of the statute. Kirby's Digest, § 1765; 71 Ark. 459; 73 *Id.* 291. Appellant was found guilty of manslaughter only, and if error, the instruction as to the higher grades of homicide was harmless. 60 Ark. 76; 54 *Id.* 4; 58 *Id.* 513; 73 *Id.* 280. But no objection was made nor saved.

5. Failure to instruct the jury not to convict of murder was not erroneous or prejudicial. No request was made for such. 67 Ark. 416; 75 *Id.* 373.

6. Proof of self-serving statements of appellant was properly rejected as incompetent.

7. Miller's testimony was admissible.

8. It was not error for the prosecuting attorney to read the instructions and discuss them. The matter does not appear in the bill of exceptions. *Larkin v. State*, 131 Ark. 449.



9. The jury had already been correctly instructed and further instructions on self-defense were unnecessary. *Supra*.

10. The remarks of the prosecuting attorney are not shown in the bill of exceptions. 58 Ark. Law Rep. 449.

SMITH, J. Appellant was indicted for the crime of murder in the first degree, alleged to have been committed by shooting Annie Baine, who was his wife. At his trial he admitted firing the fatal shot, but testified that he did so in his necessary self-defense. He and his wife had had frequent disagreements, and she had twice left him and returned to the home of her father. A reconciliation had been effected and they were living together at the time of the killing but there was testimony that they were not living together harmoniously. According to appellant, he had been ill, and was ill at the time, and left home for the purpose of purchasing some medicine, but after going some distance he discovered that he had left without his tobacco, and he returned home on that account. He testified that when he entered the room, one Carter Roseby was there having sexual intercourse with his wife, and that he caught them *flagrante delicto*. That, upon his entrance into the room, Roseby jumped up and caught him and commenced choking him down on a table, and during this struggle he attempted to get his gun to shoot Roseby and that, in the scuffle over the gun, it was discharged and his wife was killed. According to Roseby, he had dropped by the house to get a match, and had started to leave when appellant came into the room and shot his wife. This witness testified that nothing improper had occurred and that he had no quarrel with Baine, and that Baine made no attempt to shoot him either before or after he had shot his wife. The jury returned a verdict finding defendant guilty of voluntary manslaughter, and fixed the punishment at three years imprisonment in the State penitentiary.

It is chiefly insisted that the evidence is not sufficient to sustain the verdict, and, in support of this contention, the testimony is discussed at some length. We can not, however, review this evidence, because, under the well-known rules of this court, we pass only upon its legal sufficiency; and it must be said that the evidence is legally sufficient to sustain the verdict of the jury. The jury elected to believe Roseby, rather than appellant, and, if the testimony of Roseby is accepted, appellant was guilty of at least as high a grade of homicide as that for which he was convicted.

(1) Appellant requested the court to charge the jury that, in no event, could he be convicted for a higher degree of homicide than voluntary manslaughter; but the court refused to instruct the jury to this effect. This instruction was properly refused, because, according to the testimony of Roseby, appellant was, in fact, guilty of a higher degree of homicide than manslaughter. Moreover, appellant was convicted only of manslaughter, and was not given the highest punishment fixed by law for that offense, so that, in any event, no prejudice could have resulted from the refusal to give this instruction, even though it be conceded that, under appellant's testimony, he was guilty of no higher crime. But, in any event, it would have been a question for the jury to say whether or not, under the circumstances of the case, appellant was prompted by a provocation which made his passion and purpose to kill irresistible. There must be both provocation and passion to reduce a homicide to manslaughter which would otherwise be murder; and, while a man who had caught his wife *flagrante delicto* might be so moved by passion and rage as that the impulse to kill her partner in crime, or the wife herself, would be irresistible, still this, in any case, would be a question of fact for the jury, and not one of law for the court.

(2) It is insisted that the court erred in giving as an instruction Section 1765 of Kirby's Digest, which reads that "the killing being proved, the burden of prov-

ing circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless, by the proof on the part of the prosecution, it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide." It is sufficient to say that, although the giving of this instruction is assigned as error in the motion for a new trial, no objection was made to the instruction when it was given and no exception was saved.

(3) The action of the court in refusing to give an instruction requested in appellant's behalf on the question of the burden of proof is also assigned as error. If it be conceded that the instruction requested was a correct declaration of the law, it can not be said that any prejudice resulted from the failure of the court to give the instruction requested, as other instructions were given by the court which fully declared the law of that subject, one of the instructions upon this subject having been requested by appellant himself. When the court has fully and correctly declared the law upon any issue in the case, no duty devolves upon it to multiply instructions which cover the same question, and we think, therefore, that no error was committed in refusing to give all of the instructions requested by appellant on this subject.

(4) It is finally insisted that the court should not have permitted the prosecuting attorney to read the instructions to the jury and to comment upon them and explain them to the jury. It is proper, however, for attorneys in a case to argue the law of the case as applied to the testimony. Indeed, this is one of the purposes of the argument, and, inasmuch as it does not appear that the prosecuting attorney erroneously construed any of the instructions given, no error was committed in this respect.

We have here one of those constantly recurring cases where the testimony can not be reconciled; and we can not undertake to pass upon the questions of veracity

which appear in the record. The evidence is legally sufficient to sustain the verdict of the jury, and we are concluded by it.

No prejudicial error appearing, the judgment is affirmed.

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THE W. T. RAWLEIGH MEDICAL COMPANY v. ELLIS.

Opinion delivered February 11, 1918.

1. **CONTRACTS—CONSTRUCTION—AMBIGUITY—ORAL EVIDENCE.**—Oral evidence can not impart into a contract an ambiguity where none otherwise exists.
2. **CONTRACTS—CONSTRUCTION—SALE OF GOODS.**—A contract was entered into between appellant and appellee, whereby the former agreed to deliver to the latter, for resale, certain medical supplies; *held*, the court should have construed the contract under its unambiguous terms, as one for the purchase of goods, wares and merchandise, with a guaranty of payment therefor.

Appeal from Ouachita Circuit Court; *C. W. Smith*, Judge; reversed.

*J. W. Warren*, for appellant.

1. The note sued on was given in settlement of an account for which appellee was liable. No payment nor fraud was shown. 129 Ark. 384.

2. The contract was for a *sale* of goods and is unambiguous. The sale was made in Illinois on orders. 126 Ark. 597; 129 Ark. 384.

3. The court erred in its instructions. Parol evidence was not admissible to vary the terms of a written instrument. 181 S. W. 273; 188 *Id.* 566; 190 *Id.* 564; 182 *Id.* 106; 183 *Id.* 541.

4. Settlement of the account was a sufficient consideration for the execution of the note. 44 Ark. 556; 128 Ark. 10.

*Thos. W. Hardy*, for appellees.

1. Appellant is a foreign corporation and had not complied with the laws of Arkansas and was doing business in this State. 193 S. W. 497; 115 Ark. 176; 163 S. W. 757; 128 Ark. 211.

2. The contract is ambiguous and uncertain as to whether Ellis was an agent or purchaser. The issues were properly submitted to the jury. 115 Ark. 176; 124 *Id.* 543.

3. The case was submitted to the jury under proper instructions and their verdict is conclusive.

SMITH, J. The parties to this litigation entered into the following contract:

“Whereas, E. P. Ellis, of Camden, Ark., desires to purchase of W. T. Rawleigh Medical Company, of Freeport, Ill., on credit and at wholesale prices to sell again to consumers, medicines, extracts, spices, toilet articles, perfumes, polishes, stock dip and disinfectant, stock preparations and poultry supplies and other goods manufactured and put up by it, paying his account for such goods in installments as hereinafter provided; therefore, he hereby agrees to sell no other goods than those sold him by said company, to sell all such goods at regular retail prices to be indicated by it, and to have no other business or employment. He further agrees to pay the company for all goods purchased under this contract the current wholesale prices of such goods by remitting in cash each week to said company an amount equal to at least one-half the receipts from his business until his account is balanced, and for that purpose as evidence of good faith he shall submit to said company weekly reports of his business; provided, however, if he pays his account in full on or before the 10th of each month, he is to be allowed a discount of 3% from current wholesale prices. When the sale or purchase of goods under this contract shall be permanently discontinued for any reason or upon any notice given by either party, he further agrees to settle in cash, within a reasonable time, the balance due said company on account.

“Unless prevented by strikes, fires, accidents, or causes beyond its control, said company agrees to fill and deliver on board cars at place of shipment, his reasonable orders, provided his account is in satisfactory

condition, and to charge all goods shipped him under this contract to his account at current wholesale prices; also, to notify him promptly of any change in wholesale or retail prices.

"Said company agrees to furnish him free of charge on board cars at place of shipment, a reasonable amount of first-class advertising matter, report and order blanks, and printed return envelopes for his own use in conducting his business; also, to give him free of charge, after he has begun work, suggestions and advice through letters, bulletins and booklets as to the best method of selling its products to consumers.

"This contract is subject to acceptance at the home office of the company, and it is to continue in force only so long as his account and the amount of his purchases are satisfactory to said company. Provided, however, that said E. P. Ellis or his guarantors may be released from this contract at any time by paying in cash the balance due said company on account.

"Accepted March the 11th, 1911.

"The W. T. Rawleigh Medical Company,  
By W. T. Rawleigh, President.

"E. P. Ellis.

"In consideration of the W. T. Rawleigh Medical Company extending credit to the above named person, we hereby guarantee to it, jointly and severally, the honest and faithful performance of the said contract by him, waiving acceptance and all notice, and agree that any extension of time shall not release us from liability under this guarantee.

"E. P. Purifoy,

"P. B. Greening,

"W. T. Ellis,

"Metza D. Hale."

Pursuant to the terms of this contract, merchandise of the kind there named was furnished to E. P. Ellis, and, after all proper credits had been given and allowed, there finally remained due the sum of \$269.96, for which sum a note was executed to the order of the medical

company, and this suit was brought to enforce the payment of that note; but the right to maintain it is denied upon the ground that the medical company, the plaintiff below and appellant here, is a foreign corporation and has not complied with the laws of this State authorizing it to do business in this State. The medical company admits that it is a foreign corporation, and that it has not complied with the laws of this State authorizing it to do business here; but it denies that it has been doing business in this State.

It is asserted on the one hand, that the contract between the parties, out of which this indebtedness grew, was one of principal and agent; while, on the other, it is asserted that the contract between them was one for the sale of merchandise.

(1) We have had several of these cases recently presenting this identical question. The first of these cases was that of *Clark v. Watkins Medical Co.*, 115 Ark. 166; and another case in which that medical company was a party was that of *Watkins Medical Co. v. Williams*, 124 Ark. 539. In those cases we set out the contracts under which the parties had operated, and we said there that there was such ambiguity in the contracts as to make it a question of fact for the jury whether or not the relationship between the parties was that of principal and agent, or that of buyer and seller. We announced there the duty of the court to construe the terms of an unambiguous contract; and this doctrine was reiterated in the later case of *Rawleigh Medical Co. v. Holcomb*, 126 Ark. 597. In this last cited case we set out the contract between the parties to that litigation and held that there was no such ambiguity in its terms as warranted a submission to the jury of the question of its meaning. We said there that was an unambiguous contract and that 'the court should not only have construed it, but should have construed it as constituting the relation of buyer and seller, and not that of principal and agent. While this is apparently the same medical company which was a party to the litigation in the last-cited case, it appears that the

contracts set out in the two cases are not identical. We think, however, that the contract in the instant case is no more ambiguous than was the contract in the former case to which this medical company was a party. The trial court took the opposite view and permitted the introduction of testimony which was intended to explain the nature of this contract and which is said to show that the contract was, in fact, one of principal and agent. The evidence in this respect is substantially the same as the testimony in the Holcomb case, *supra*; but such testimony can not import into a contract an ambiguity where none otherwise exists.

(2) It is very earnestly insisted by counsel for appellee that this case is concluded by the opinion of this court in the cases referred to above in 115 and 124 Arkansas. But a comparison of the contracts set out in those cases will disclose a number of points of difference. There are provisions contained in the contracts set out in the earlier cases which do not appear in the contract now under consideration; and it is these provisions which we said created the ambiguity which rendered admissible the parol testimony which was offered to explain this ambiguity. For instance, in the Williams case, *supra*, we said that the jury might have found "That the consignee was not definitely and absolutely bound, at all events, to pay for the goods. That the consignee could fulfill his contract by accounting to the consignor for all goods sold and by returning to the consignor the unsold goods. That the consignee had the right, under any circumstances, to return any of the consigned goods. That no part of the purchase price for the goods became due the consignor except upon a sale made by the consignee. That the goods were not to be paid for as upon a sale to the consignee, but only upon a sale by the consignee. That the consignee was to render regular accounts and reports of the business, showing the amounts and prices of goods sold, whether sold for cash or credit, the amount of goods on hand and outstanding accounts. That there was no stipulation either to sell or to pay for



the goods in a fixed time. That all unsold goods were to be returned to the consignor when the contract was terminated by either party."

In those cases the purchaser was referred to as an agent, and, while we said that his designation as an agent was not controlling and did not, of itself, render him such, still it was one of the circumstances to be considered in determining what that relation was. We also there pointed out that the contract gave to the medical company the right to terminate the services of the person designated as agent upon written notice to that effect in case of the agent's violation of this contract or in the event of his failure to satisfactorily discharge these duties under his agreement. The contract now under consideration does not contain the provisions, which we said made those contracts ambiguous; and the court should, therefore, have construed the contract according to its unambiguous terms as one for the purchase of goods, wares and merchandise, with a guaranty of payment therefor.

The judgment of the court below will, therefore, be reversed, and as the sum due is not in dispute, judgment will be rendered here for the amount of the note.

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BUTLER COUNTY RAILROAD COMPANY *v.* ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD COMPANY.

Opinion delivered February 11, 1918.

1. EMINENT DOMAIN—DAMAGES—JURISDICTION.—Damages in condemnation proceedings must be determined in the circuit court, the proceedings being strictly statutory and legal. Equity will interfere by injunction only when an attempt is made to take property for private instead of public purposes. In order to invoke this equitable interference, the bill or cross-bill must state facts from which a court can draw conclusions; the statement of conclusions is not sufficient.
2. EMINENT DOMAIN—CONDEMNATION OF RIGHT-OF-WAY ACROSS RAILWAY TRACK—EQUITY JURISDICTION.—Plaintiff railway company brought condemnation proceedings to condemn a right-of-way across the track of defendant railway company. Defendant an-

swered, setting up that plaintiff sought to condemn for a private purpose only. The cause was transferred to equity, where the complaint was dismissed. *Held*, the fact that private purposes are to be subserved does not exclude the right of the public to enjoy the utility, and that the allegations of the answers were insufficient to warrant a transfer of the cause to equity, and that the decree dismissing the complaint was erroneous.

Appeal from Clay Chancery Court, Eastern District; *Archer Wheatley*, Chancellor; reversed.

*G. B. Oliver*, for appellant.

1. The court erred in transferring the cause to the chancery court. The proceeding to condemn a right-of-way is statutory, and can only be determined in the circuit court. Where the land is sought for other than a public purpose, equity will relieve by injunction. 43 Ark. 111; 59 *Id.* 171; 76 *Id.* 239; 78 *Id.* 83; 91 *Id.* 231; 99 *Id.* 61; 102 *Id.* 492; 104 *Id.* 344.

2. No affirmative relief is asked by appellee, and its cross-complaint is not sufficient to entitle it to have the cause transferred to equity. 104 Ark. 344, 352.

3. Appellant was entitled to condemn the right-of-way for public purposes. 104 Ark. 344; 57 *Id.* 359; 97 *Id.* 86. The testimony shows that the right-of-way was sought for public purposes and not merely for private use.

HUMPHREYS, J. The appellant, Butler County Railroad Company, is a Missouri railroad corporation, authorized to construct, maintain and operate a railroad for public use within Arkansas, commencing at Poplar Bluff, Missouri, and running to Piggott, Arkansas. Appellee, Missouri, Kennett & Southeastern Railroad Company, is also a Missouri railroad corporation authorized to construct, maintain and operate a railroad for public use from Kennett, Missouri, to Piggott, Arkansas. The railroads were built and each has a main track in Piggott, Arkansas, running almost parallel in a southeasterly direction, connected by interchange tracks. Meyers Stave & Manufacturing Company is located in a northeasterly direction from the main tracks, the main track of appellee being between the main track of appellant and the stave

manufacturing company. The stave manufacturing company purchased timber up and down both railroads for a great distance and shipped its finished product out on both roads. Appellant company delivered the raw material consigned to the stave company, and received its shipment of finished product from the stave company through the aid of appellee company on a switching charge basis. In other words, after appellant brought raw material to Piggott for the stave company it was carried over the interchange track and over appellee's spurs to the stave company on a switching charge basis of seventy-five cents a car. On account of switching the raw material in, it caused a delay of about two days on incoming freight; and the same method and delay obtained as to the outgoing shipments of finished products. A shuttle factory, temporarily shut down, was similarly situated. Berry shippers were in like condition. An ice plant was in contemplation of construction in the same locality, which would suffer the same inconveniences if built.

Appellant desired to build a direct spur from its own main track across the main track and right-of-way of appellee to that part of the town in which the stave factory and shuttle factory were located. In aid of that desire, it instituted suit in condemnation against appellee in the Clay Circuit Court for the Eastern District, making all necessary allegations required by statute in condemnation proceedings. It sought to condemn the following lands, to-wit: Beginning at a point in the east line of the Butler County Railroad right-of-way one hundred and one (101) feet south of the north line of the southwest quarter of the southwest quarter of section 11, township 20 north, range 8 east, running thence southeasterly on a fifteen-degree curve to the left, crossing the center line of the main line of the St. Louis, Kennett & Southeastern Railroad, at a point 159.8 feet south of the north line of the said southwest quarter of the southwest quarter of section 11, and intersecting the east right-of-way line of the St. Louis, Kennett & Southeastern Railroad at a point 223.5 feet south, 28 degrees and 15 minutes

east of a point in the north line of the southwest quarter of the southwest quarter of section 11, township 20 north, range 8 east, 603.4 feet east of the northwest corner thereof, all being a part of the southwest quarter of the southwest quarter of section 11, township 20 north, range 8 east, and which is more particularly shown by reference to a plat of said land hereto attached and made part hereof.

Appellee answered in substance that appellant was not attempting to condemn the land for public purposes, but for private use; and in an attempt to serve only one industry which was being served on a switching charge basis; that it sought to condemn the right-of-way to avoid the switching charges and for private gain only. On motion of appellee, the cause was transferred to the chancery court, where the cause was heard and the complaint dismissed. From the decree dismissing the complaint, an appeal has been prosecuted to this court.

The first question to be determined is whether the allegations in the answer are sufficient, if treated as a cross-bill, to have the cause transferred to equity. Damages in condemnation proceedings must be determined in the circuit court, the proceeding being strictly statutory and legal.

Equity will interfere by injunction only when an attempt is made to take property for private instead of public purposes. *Mountain Park Terminal Ry. Co. v. Field*, 76 Ark. 239. In order to invoke this equitable interference, the bill or cross-bill must state facts from which a court can draw conclusions. The statement of conclusions is not sufficient. Paragraph 4 of the answer in the instant case is as follows:

“Defendant railroad, further answering, says that the plaintiff railroad does not seek to appropriate said defendant railroad company’s land for public use or for any public purposes, but that it seeks to appropriate said lands for private use only. Defendant railroad further says that there is located on defendant railroad’s land and served by defendant an industry, said industry being

connected with said defendant railroad by spurs and connections; that said plaintiff railroad and defendant railroad are connected by certain tracks, that said railroads have established certain switching charges and cars are transferred from one railroad to the other; that said defendant railroad company can in every way serve properly said industry as referred to above; that said plaintiff railroad seeks for private gain only to cross said defendant's track, and not for public use or for any public purposes."

This answer is on a par with the answer and cross-bill in the case of *St. L., I. M. & S. Ry. Co. v. Fort Smith & Van Buren Ry. Co.*, 104 Ark. 344. In that case this court characterized the answer as a statement of a conclusion only, and in discussing its insufficiency said: "The fact that private purposes are subserved would not exclude the idea that the public may also participate in the enjoyment of the utility. The law gives all a right to use it on equal terms, and, as we declared in the recent case of *Ozark Coal Company v. Pennsylvania Anthracite Railroad Co.*, 97 Ark. 495, this makes the use a public one, even though private interests are primarily intended to be served." The allegations in the answer were insufficient to warrant a transfer of the cause from the circuit court to the chancery court.

We are also of the opinion that the evidence in this case establishes the fact that the spur, when built, will be for a public use. It will serve several industries and the shipping public in a more convenient and expeditious manner.

For the reasons indicated, the decree dismissing the complaint is reversed and the cause remanded with instructions to transfer it to the circuit court to ascertain the damages to which appellee is entitled.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v.  
ELZEN.

Opinion delivered February 11, 1918.

1. RAILROADS—INJURY TO PERSON ON TRACK.—Where plaintiff was injured by being struck by a moving train, at a public crossing, *held*, under the evidence, that the court, properly submitted to the jury the issue of defendants' liability for negligence.
2. NEGLIGENCE—DISCOVERED PERIL.—When a traveler is discovered in a perilous position on or near the railroad track by the enginemen on a moving train, it is the duty of the latter to use every reasonable precaution consistent with the proper operation and management of the train, to avoid injuring the traveler.

Appeal from Saline Circuit Court; *Scott Wood*, Judge; affirmed.

*T. S. Buzbee* and *H. T. Harrison*, for appellant.

1. Plaintiff was guilty of negligence, which precludes his recovery. 110 Ark. 106; 102 *Id.* 160; 101 *Id.* 321; 62 *Id.* 156; 61 *Id.* 559; 84 *Id.* 270; 76 *Id.* 10; 54 *Id.* 435; 125 *Id.* 509. See also 107 *Id.* 220.

This rule is not abrogated by the "lookout" statute of 1911. 125 Ark. 509; *Tyler v. Ry. Co.*, ms., Oct. 29, 1917; 84 Ark. 270.

*H. S. Powell*, for appellee.

1. Negligence of the train crew was a question for the jury. Negligence was proven. 64 Ark. 239. Appellee was not a trespasser; he was a traveler on a public street and had a right to be there, and it was the duty of the company to protect him, using due care. They saw him, and should have avoided the injury. 69 Ark. 130; 108 *Id.* 335; 96 *Id.* 73; 94 *Id.* 246; 125 *Id.* 428.

2. There was no error in the court's instructions. 69 Ark. 130; 124 *Id.* 518; 119 *Id.* 36. No contributory negligence is shown. 84 Ark. 270 is not in point, as appellee did not know the train was coming over track 4. The evidence supports the verdict.

HUMPHREYS, J. Appellee brought suit against appellants in the Saline Circuit Court to recover damages for an injury received by him at Washington avenue

crossing, on the 21st day of December, 1915, in El Dorado, Arkansas, from appellant's moving train, through the alleged negligence of their servants.

Appellants severally denied negligence on their part, and, by way of further defense, pleaded contributory negligence on the part of appellee.

The cause was submitted to the jury on the pleadings, evidence and instructions of the court. A verdict was returned in favor of appellee for \$1,500 and a judgment rendered in accordance therewith, from which an appeal has been properly prosecuted to this court.

The cause was sent to the jury upon the issues, first, of discovered peril, and, second, whether appellee had knowledge of the approaching train.

It is insisted by appellants that the court erred in submitting these questions to the jury. It is said that the court should have exempted appellants from liability under the undisputed evidence in the case. This is true if the undisputed evidence disclosed that the enginemen exercised reasonable care to prevent the injury after discovering the perilous situation of appellee; or if the undisputed evidence revealed the fact that the appellee was aware of the danger and walked into it either thoughtlessly, carelessly or with a view to being able to extricate himself from it.

The facts in the record responsive to the issues thus stated are, in substance, as follows: Appellee was walking south in the night time in El Dorado, Arkansas, on Washington avenue, which was crossed by four railroad tracks, referred to by the parties for convenience as tracks 1, 2, 3 and 4. The injury occurred on the south track, designated as track 4, at a point where the track intersects the west side of said avenue. As appellee walked he was facing a street light not far distant on the east side of the avenue. Track 3 approached the avenue in a northeasterly direction and crossed it diagonally in a straight course. Track 4 parted from track 3, 326 feet southwest of the avenue and crossed the street on a curve in the same general direction. Tracks 3 and 4 were about

100 feet apart where they crossed the avenue. Appellee testified that when crossing track 3 he observed a light from the headlight of an engine in the railroad yards to the southwest shining on track 3; that when between tracks 3 and 4, he looked again in the direction of the yards and saw a light from a headlight still shining on track 3, which was then in his rear; that he heard no train coming, nor whistle blowing nor bell ringing; that he then stepped on track 4, at which time the light suddenly flashed over him, and he jumped but was struck by an engine and knocked off the track on the engineer's side and injured.

The engineer and fireman testified that they discovered appellee approaching track 4 just before they reached the connecting switch of tracks 3 and 4 where they turned onto track 4, and that the engineer blew four short blasts of the whistle to attract appellee's attention. The engineer testified that after he turned on track 4 the curve caused the engine to obstruct his view and prevent him from seeing appellee. The firemen testified that he observed appellee continuously from the time he crossed track 3 until he was hit by the train on track 4, and that he did nothing himself to attract the attention of appellee; that appellee was walking rapidly with his hands in his pockets toward track 4; that appellee's hat was pulled down to one side as if to prevent the headlight from shining in his eyes, and walked toward and on track 4 without evidencing in any manner that he had discovered the approach of the train. As long as appellee was within the range of the engineer's vision, his description of appellee's manner and movements was the same as those described by the fireman. Both testified that the bell was continuously ringing as the train approached the crossing and that they thought appellee would stop before he stepped on track 4. The testimony was conflicting as to the speed of the train and as to whether signals were being given when the train approached the street crossing.



It can not be said in the instant case, as was said in the cases of *St. Louis & San Francisco Rd. Co. v. Ferrell*, 84 Ark. 270, and *Tyler, Admx., v. St. Louis, I. M. & S. R. Co.*, 130 Ark. 583, that the injured parties knew the trains were approaching and for that reason were cognizant of the danger. Of course, it can not be said that the proximate cause of the injury was the negligence of the railroad company in failing to give signals if the injured party already knew of the approach of the train. The instant case is clearly distinguishable from the *Ferrell* and *Tyler* cases, *supra*. It was almost conclusively shown by the positive evidence in the instant case that the appellee did not know the train was approaching. Under all the facts and circumstances in the case, it might, however, be regarded as a disputed fact to be determined by a jury. There was a direct and unmistakable conflict in the evidence as to whether signals were given by the engine-men as the train approached the crossing on track 4.

The doctrine of discovered peril is well settled in this State, and is to the effect that when a traveler is discovered in a perilous position on or near the railroad track by the engine-men on a moving train, it is their duty to use every reasonable precaution, consistent with the proper operation and management of their train, to avoid injuring the traveler. *Inabnett v. St. L., I. M. & S. Ry. Co.*, 69 Ark. 130; *St. L. & S. F. Rd. Co. v. Champion*, 108 Ark. 326.

Under the facts in this case, the issues were determinable by the jury and not by the court. The issues were submitted under proper instructions, and, there being no error in the record, the judgment is affirmed.

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#### BARNETT BROS. v. WESTERN ASSURANCE COMPANY.

Opinion delivered February 18, 1918.

#### RES ADJUDICATA—FORMER JUDGMENT—FORMER APPEAL—AFFIRMANCE.—

A cause was appealed to this court and affirmed because of a failure of appellant to comply with a rule of this court as to filing an abstract of the record. *Held*, the judgment of affirmance operated as a complete bar to any other action on the same cause.

Appeal from Hot Spring Circuit Court; *W. H. Evans*, Judge; affirmed.

*Oscar Barnett*, for appellants.

1. The former adjudication is not a bar to this suit. It was not tried on its merits, and the affirmance was nothing but an affirmance of a judgment of *involuntary nonsuit* and is not *res judicata*. 173 S. W. 412; 158 *Id.* 69; 173 *Id.* 412; 2 Black on Judgm. (2 ed.), 693, 702; 108 S. W. 594; 22 *Id.* 710; 128 *Id.* 10; 148 S. W. 160; 173 *Id.* 412, etc. Kirby's Digest, § 4381; 88 S. W. 572; 75 Ark. 406.

2. Argues the merits of the cause.

*Mehaffy, Reid & Mehaffy*, for appellee.

1. This case has already been finally adjudicated on its merits. The matter is *res judicata*. 191 S. W. 226; 2 Black on Judg. (2 ed.) 703; 15 R. C. L. 983; 20 S. E. 310; 30 Fed. 421; 140 N. Y. S. 993; 135 Pac. 717; 130 *Id.* 551. See also 89 Fed. 636; 43 S. W. 191; 94 *Id.* 887; 45 Atl. 243; 74 N. E. 1120.

McCULLOCH, C. J. This is an action instituted by appellants against appellee on a fire insurance policy, and was tried below solely on appellee's plea of a former adjudication of the same cause of action. It appears from the record that appellants formerly instituted an action on the same cause of action in the same court, and that a judgment was rendered in favor of appellee, and the judgment was, on appeal to this court, affirmed. 126 Ark. 562.

It is contended by appellant that the former adjudication does not constitute a bar to the second action because this court did not consider the case on its merits, but affirmed the judgment on account of noncompliance with the rules of this court in failing to submit a sufficient abstract of the record. Regardless of the particular reasons given for the action of this court, the judgment was one of affirmance of the judgment of the trial court, and it operated as a complete bar to any other action on the same cause.

Counsel insists that the judgment in the other action was equivalent to a nonsuit, which does not bar another action. It is clear that counsel labors under a mistake as to the effect of the former judgment, which operates as a bar and precludes any further investigation as to the merits of the original cause of action.

Affirmed.

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DAVIS v. NELSON & SON.

Opinion delivered February 18, 1918.

**TRIAL—INSTRUCTION ON NINE JURY VERDICT.**—An instruction that “if nine members of the jury should agree on a verdict, then the jury could return a verdict for the party plaintiff or defendant in accordance with the agreement of said nine jurymen,” is erroneous and prejudicial, where it does not appear from the record that the verdict was unanimous; and appellant does not lose his right to a reversal where he failed to have the jury polled.

Appeal from Union Circuit Court; *C. W. Smith*, Judge; reversed.

*Gaughan & Sifford*, for appellant.

1. The instruction of the court that nine members of the jury agreeing would justify a verdict was error. 130 Ark. 264.

2. Where an instruction is erroneous, the judgment should be reversed unless it affirmatively appears that the instruction is harmless. 110 Ark. 557; 69 *Id.* 134; 70 *Id.* 79; 67 *Id.* 604; 82 *Id.* 504-510; 107 *Id.* 170.

*Powell & Smead*, for appellee.

1. The error, if any, does not appear from the record, and the verdict may have been unanimous. The contrary is not shown. Kirby's Digest, § 6203; 95 Ark. 71.

McCULLOCH, C. J. In the trial of this action the court instructed the jury, over appellant's objection, that “if nine members of the jury should agree on a verdict, then the jury could return a verdict for the party plaintiff

or defendant in accordance with the agreement of said nine jurymen." This instruction was given by the court pursuant to the terms of a statute enacted by the General Assembly of 1917 (Acts of 1917, page 229), providing "that the verdict of any nine of the jurors in a civil case shall be accepted as the verdict of the jury," but this court decided in the case of *Minnequa Cooperage Co. v. Hendricks, Judge*, 130 Ark. 264, that the statute is unconstitutional. The statute is void as offending against the constitutional guaranty of the right of trial by a jury. The present case was tried in the court below prior to the decision of this court in the case cited above. The verdict of the jury was in appellee's favor without disclosing whether it was the unanimous verdict of all of the members of the jury or a less number of them.

The contention of appellee's counsel in support of the judgment is that the prejudicial effect of the instruction does not appear from the record for the reason that the verdict of the jury may have been unanimous and that appellant failed to show to the contrary, as he might have done by having the jury polled. The right to have a jury polled is a privilege provided for by statute (Kirby's Digest, section 6203), but appellant did not forfeit his right to insist that the direction of the court was erroneous merely by failing to have the jury polled. The polling of the jury might not have disclosed that the erroneous direction of the court had no prejudicial effect, for under that direction as a guide to the action of the jury a verdict concurred in by nine jurors was the verdict of the whole jury. The rule here is that a reversal of a judgment is ordered where it is shown that the instructions of the court were erroneous, unless it appears from the whole record that no prejudice resulted.

We are of the opinion, therefore, that the erroneous instruction concerning the concurrence of a less number than all of the jurors calls for reversal of the judgment in this case, notwithstanding the fact that the jury was not polled.

Reversed and remanded for a new trial.

## BRAY v. BRAY.

Opinion delivered February 18, 1918.

**DEEDS—DELIVERY—INTENT.**—The question of delivery is generally one of intention as manifested by acts or words, and there is no delivery unless there is an intention on the part of both the actors in the transaction to deliver the deed in order to pass the title immediately to the land conveyed, and that the grantor shall lose dominion over the deed.

Appeal from Yell Chancery Court, Dardanelle District; *Jordan Sellers*, Chancellor; affirmed.

*John B. Crownover*, for appellant.

1. The evidence shows conclusively that the deed was delivered with intent to pass title. 98 Ark. 466; 15 *Id.* 538; 82 *Id.* 47; 97 *Id.* 104; 22 *Id.* 488; 7 *Id.* 505; 93 *Id.* 324; 23 *Id.* 746.

2. The findings of the chancellor are clearly erroneous, and the decree should be reversed. 31 Ark. 85; 77 *Id.* 216; 114 *Id.* 121. See also 75 *Id.* 72; 43 *Id.* 307; 42 *Id.* 522.

*Davis & Bohlinger*, for appellee.

1. There was no delivery of the deed with intent to pass title. 77 Ark. 89; 98 *Id.* 466; 2 Tiffany, Real Prop. 406; 124 S. W. 778; 13 Cyc. 569, 570; 90 S. W. 617; 24 Ark. 244.

2. The finding of the chancellor is supported by the evidence.

**McCULLOCH, C. J.** The parties to this suit are related to each other as father and son. Appellant instituted the action against his father in the chancery court of Yell County to compel the restoration of a deed alleged to have been executed to him by his father conveying a tract of land in that county containing forty acres. He alleged in the complaint that his father came to live with him under a verbal agreement that he (appellant) should take care of his father and provide him a comfortable home and living the balance of his life, and that his father, in consideration thereof, executed the deed in question

conveying the land, subject to his father's use and enjoyment of rents during his life. He alleged that the deed was duly executed and delivered to him by his father, but that after the delivery he left the deed with his father for safe keeping and that later his father became dissatisfied and left the premises and carried the deed off with him. He also alleged in the complaint that his father had \$500 in cash and delivered it to him under an agreement that he should pay his father \$50 a year during the latter's lifetime, and that the principal sum should be his upon the death of his father.

It is alleged in the complaint that a note evidencing the transaction with respect to the money was executed and that appellee had also taken that note away with him when he left the premises. In the answer appellee denied that he delivered the deed to appellant. The cause was heard by the chancellor upon that issue of fact.

It is undisputed that appellee, who had reached extreme old age, went to live with his son, the appellant, and about that time executed a deed purporting to convey the land in question to his son, but there is sharp conflict in the testimony as to whether or not the deed was ever delivered with the intention of passing the title. The deed contained the reservation of the use and occupation of the premises during the life of the grantor. Appellee was living in the house with appellant at the time the deed was executed. Appellant testified that his father brought the deed home and delivered it to him, but the next day suggested that it be returned to him and for safekeeping locked up in a tin box in appellee's trunk; that they acted upon that suggestion and the deed was placed in appellee's trunk and kept there until the latter left the premises and took the deed with him. Several other witnesses were introduced by appellant, all of them members of his family, who testified that there was a delivery of the deed, but that it was returned to the old man the next day to be put away in the trunk for safekeeping. The witnesses testified that the agreement between appellant and appellee at the time the deed was returned was that when

the old man died appellant was to break the trunk open and get the deed and have it recorded. The deed was never placed of record. It was kept in appellee's trunk. The tin box in which it was kept and the trunk itself were both kept locked and the deed remained there until the old man carried it away. Several of the witnesses introduced by appellant testified that declarations were made by appellee at different times to the effect that he intended for his son, the appellant, to have the land at his death. None of the witnesses testified to any declaration of appellee showing that there had been a delivery of the deed with intention to convey the title immediately, but all of the testimony of that character was to the effect that the land was to become appellant's at the time of the old man's death.

While the numerical weight of the testimony is against appellee, we do not think that there is a preponderance of the evidence against the finding of the chancellor in holding that there was not a delivery of the deed with intent to pass title. We have said that the question of delivery is generally one of intention as manifested by acts or words, and that there is no delivery unless there is an intention on the part of both of the actors in the transaction to deliver the deed in order to pass the title immediately to the land conveyed, and that the grantor shall lose dominion over the deed. *Cribbs v. Walker*, 74 Ark. 104; *Maxwell v. Maxwell*, 98 Ark. 466; *Battle v. Anders*, 100 Ark. 427.

Measured by this rule, we can not say that the chancellor reached a conclusion contrary to the preponderance of the evidence in holding that the circumstances are insufficient to show that appellee delivered the deed with intention to pass title. Even if it be conceded that the preponderance of the evidence shows that the deed was handed to appellant by appellee on one day and taken back the next day for safe keeping, when all the circumstances are considered together and what was said at the time, they do not indicate an intention to immediately pass the title, but merely to keep the deed in the posses-

sion of the grantor until his death, when it was then to be taken over by the grantee and recorded.

There is no contention here that appellant was entitled to any relief in regard to the note. Whatever may be the terms of the writing, it is not contended that appellee has violated any duty to appellant in keeping the note in his possession.

The decree is affirmed.



KIRBY v. WOOTEN, ADMINISTRATOR.

Opinion delivered February 18, 1918.

APPEAL AND ERROR—DIRECTED VERDICT—HOW TESTED.—On appeal from a directed verdict, the evidence must be given its strongest probative value in favor of the party against whom the verdict is directed, and if there is any evidence tending to establish an issue in his favor, the court should allow the issue to go to the jury.

Appeal from Lee Circuit Court; *J. M. Jackson*, Judge; reversed.

*Moore, Vineyard & Satterfield*, for appellant.

1. It was error to direct a verdict. The Maynard estate was indebted to Kirby in some amount, and the matter should have been submitted to a jury. 120 Ark. 206. See also 103 Ark. 401; 101 *Id.* 22; 96 *Id.* 394; 147 S. W. 93; 140 *Id.* 996; 131 *Id.* 947.

*D. S. Plummer and Daggett & Daggett*, for appellees.

1. Kirby's testimony was inadmissible, and there was no testimony to prove Kirby's claim. There was nothing to submit to a jury, and a verdict was properly directed.

2. There is evidence sufficient to show that March 2, 1916, there was a settlement to date and a balance struck. A new contract was made and there was a stated account between the parties. The books of Maynard show a balance due of \$359.07, and the court was correct in instructing a verdict. It was also shown that a settlement was had after Maynard's death, and there was



due \$410.55 under the note. The findings of the chancellor are supported by the evidence.

STATEMENT OF FACTS.

For several years prior to March, 1916, H. C. Maynard was a merchant at Rondo, Lee County, Arkansas. For two or three years the appellant had been trading with Maynard, and on the 2d of March, 1916, appellant executed a deed of trust to secure a balance of \$359.70 for past indebtedness due Maynard, and also for supplies to be furnished to make the crop for the year 1916. Kirby executed a note in the sum of \$500. The deed of trust embraced certain personal property. A short time after the deed of trust was executed Maynard died intestate and T. C. Wooten was appointed his administrator.

On the 24th of April, 1916, a contract was entered into between the administrator and Kirby and one T. L. Shapard, by which Kirby released the administrator from carrying out Maynard's contract to furnish supplies, and by which Shapard, for the consideration mentioned, undertook to furnish supplies. In this contract Kirby admitted that he was indebted to Maynard's estate in the sum of \$410.55, and agreed that the mortgage executed by him on the 2d of March, 1916, should remain in full force and effect. The note secured by the deed of trust was endorsed to show the amount due thereon.

On the second day of November, 1916, Kirby tendered to the administrator of Maynard's estate the sum of \$121.90, and presented to him an account against the estate, claiming that the estate was indebted to him in the sum of \$288.10, and requested the administrator to satisfy the mortgage and cancel the note. The administrator refused to do this, and on the 8th of November appellant instituted suit for the possession of the property described in the deed of trust, and on the same day filed his claim against the Maynard estate in the probate court of Lee County, verified as required by law.

On December 11, 1916, the claim was disallowed by the probate court, and an appeal was taken to the circuit

court. In the circuit court the causes were consolidated by agreement, and the issues were sent to a jury.

Kirby testified, admitting the execution of the note and mortgage, and stated that Wilse Wooten was the only one present besides himself and Maynard when the mortgage was executed; that Wooten was the notary public who took his acknowledgment. He stated that at the time the mortgage was executed he claimed the amount that was due him, the amount of the account which he afterwards presented against Maynard's estate, and Maynard told him it could be settled later. He then proceeds to testify as to the correctness of the various items of the account. He stated that he was not given credit for the work done for and the property furnished to Maynard; that it was mentioned at the time. He had paid the balance on the note, less these items of credit, except the sum of fifty-five cents, which he admitted was still due on the note. He did not get credit on the second of March, when he executed the note and mortgage to Maynard, but Maynard told him that he would give him credit later.

The testimony of Kirby concerning the items of his account and the transactions had with Maynard was objected to by the attorney representing the administrator of Maynard's estate.

Witness Wooten testified that he was present and heard part of the conversation between Maynard and Kirby at the time the mortgage was executed and heard Maynard tell Kirby that he would give him the credits later on in the fall in settlement for what was owing to him; told Kirby to make up a list of what he, Maynard, owed him and that he would give him credit later on.

One witness testified that in the year 1915 Maynard got some hay from Kirby. Another witness testified that Maynard got a black mule from Kirby in 1915, that Kirby lent Maynard the mule and the mule died while in Maynard's possession. The testimony showed that the mule was worth \$100.

T. C. Wooten testified that he was administrator of the estate of Maynard; that he took possession of May-

nard's books, and the books showed a balance of \$359.70 due from Kirby to Maynard. He exhibited the contract already referred to between himself, Kirby and Shapard. He had no conversation with Kirby before the contract was drawn up with reference to credits. The credits were not mentioned until about a month afterwards. Kirby paid witness, on November 2, 1916, \$121.90. Kirby did not owe the full amount of \$500; he had not taken up the full amount of the \$500 when Maynard died, and the sum of \$200 was released. The note bears this endorsement: "Balance due on this note under contract between W. F. Kirby, T. L. Shapard and T. C. Wooten, administrator, dated April 24, 1916, \$410.55."

Kirby testified, in rebuttal, that he had paid to the administrator, the difference between the amount of his claim against the estate of Maynard and the amount due by him to the Maynard estate, but the administrator had not released the papers.

The court gave certain instructions and the record recites the following:

"Thereupon, while the case was being argued to the jury, and at a time when Mr. Daggett, of counsel for plaintiff, was making the closing argument to the jury, the court requested that such argument be suspended, and thereupon gave to the jury the following instruction, to-wit: 'Gentlemen of the jury, under the law and the evidence in this case you will return a verdict for the administrator for the value of the property described in the complaint.' Thereupon, W. R. Satterfield, counsel for W. F. Kirby, objected to the giving of such peremptory instruction, which objection was by the court overruled, to which ruling and action of the court counsel for Kirby duly excepted." The court further instructed the jury, over the objection of appellant's counsel, that the defendant's claim "will be disallowed." The court then excluded from the jury all the testimony of W. F. Kirby regarding any statements or transactions with the deceased, H. C. Maynard, regarding the items mentioned in the account of W. F. Kirby, and thereupon instructed the

jury, peremptorily, under the law and the evidence of the case, to return a verdict for the plaintiff for the possession of the property described in the complaint, and to disallow the claim of the defendant, W. F. Kirby.

WOOD, J., (after stating the facts). The court was correct in excluding the testimony of Kirby concerning his alleged transactions with Maynard, and the statements alleged to have been made by Maynard to him concerning his account. But after excluding this testimony there was testimony making it an issue for the jury to determine whether or not the estate of Maynard was indebted to Kirby, and the amount, if any, of such indebtedness.

Wooten, who was present when the note and mortgage were executed by Kirby to Maynard, testified that he heard Maynard tell Kirby that he would give him credits later on in the fall in settlement for what was owing to him (Kirby) and directing Kirby to make up a list. This was competent testimony, and tended to show that at the time the note and mortgage were executed Maynard acknowledged that Kirby had an unsettled account against him for which Kirby was entitled to credit. Then the testimony of other witnesses tended to prove that Kirby, as late as the spring of 1915, had furnished Maynard hay and a mule.

Even though Maynard's estate may not have been indebted to Kirby in the full amount of the account claimed by him, the above testimony tended to prove that he was indebted to him in some amount. The peremptory instruction by the court deprived the appellant of the right to have the jury determine whether or not the Maynard estate was indebted to him in any sum. As to whether or not the estate of Maynard was indebted to Kirby, and if so, the amount of such indebtedness, were issues, under the evidence, to be submitted to the jury under proper instructions.

The court, therefore, erred in its ruling directing the jury to return a verdict in favor of the appellee. On appeal from a directed verdict, the evidence must be given

its strongest probative value in favor of the party against whom the verdict is directed, and if there is any evidence tending to establish an issue in his favor, the court should allow the issue to go to the jury. *Williams v. St. Louis & San Francisco Rd. Co.*, 103 Ark. 401; *Barrentine v. The Henry Wrape Co.*, 120 Ark. 206.

For the error indicated, the judgment is reversed and the cause is remanded for a new trial.

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v.  
STALLINGS.

Opinion delivered February 18, 1918.

1. CARRIERS—DELAY IN SHIPPING CATTLE.—A. had cattle to ship over defendant carrier's line, and was told that a car would be ready for shipment on a certain train. The train did not take up the car, nor did the next train, which the agent told A. would take up his car of cattle. A. suffered damages by reason of the delay. *Held*, a verdict in A.'s favor would not be disturbed.
2. CARRIERS—DELAY IN SHIPPING CATTLE—DAMAGES.—Under the above facts, *held* that where many of the cattle lost weight by reason of the delay, and others broke loose and had to be recovered, there being fifty-seven head in all, that a verdict for \$150 damages was not excessive.

Appeal from Prairie Circuit Court, Southern District; *Thomas C. Trimble*, Judge; affirmed.

*Thos. S. Buzbee* and *Geo. B. Pugh*, for appellant.

1. This case does not fall within the rule in 88 Ark. 138. Defendant was not liable under the facts proven. Defendant's agent finally told plaintiff that the through train would not stop for the cattle. Defendant had no right to agree to give plaintiff service not given to the public generally. 225 U. S. 155.

2. The verdict is grossly excessive and based on incompetent testimony as to classification, weight and shrinkage. The testimony as to loss in weight was a mere guess. There was no responsibility for the escape of the bull. The cattle were not hurt or injured. 68 Ark. 218-222.

3. Incompetent testimony which was prejudicial was admitted. 68 Ark. 218.

*Trimble & Williams*, for appellee.

1. This case comes fairly within 88 Ark. 138, and is not in line with 225 U. S. 155.

The agent stated the cattle would go on the through train that night.

2. The verdict is not excessive. The cattle had been weighed and plaintiff was a stock man and familiar with shrinkage of cattle. The testimony was competent and the verdict small. The witnesses were experienced in the cattle business and qualified to testify as to loss in weight.

3. There is no error in the instructions, and the verdict is supported by the evidence.

HART, J. C. R. Stallings sued the Chicago, Rock Island & Pacific Railway Company and Jacob M. Dickinson, Receiver, for damages to a car of cattle for delay in shipping them.

The answer of the defendants was a general denial. The case was tried before a jury, which returned a verdict for the plaintiff in the sum of \$150. From the judgment rendered the defendants have appealed.

It is first contended by counsel for defendants that there was no liability under the facts proved by the plaintiff. The plaintiff was in the live stock business and lived at Hazen, Arkansas. Before the 20th of November, 1915, he ordered a stock car for shipment of some cattle to East St. Louis, Illinois. The car did not come on the day it was expected. The plaintiff had his cattle in a pasture about a mile and a half or two miles from Hazen. He was informed that the car would be there on a certain morning attached to the local freight. He sent out to the pasture and had his cattle brought to the station. He got them in the stock pen while the train was there, but before he could load them into the car the train pulled out. It was the custom of the local freight to wait for cattle to be loaded in the car when they were in the stock pen. When the train left without carrying his cattle, the plain-

tiff went to the agent and asked him when there would be another train. The agent, after telegraphing about the matter, told him there would be a through freight train along there some time in the night which would carry the car of cattle. There were forty-seven head of the cattle and seven of them were bulls. The agent directed the plaintiff to tie the bulls in the car. This was done. It was understood that the other cattle should be kept in the pen until the freight train would arrive when they would be loaded into the car. The through freight did not stop for the car of cattle that night and the bulls broke loose and escaped. The cattle were kept there until 5 o'clock the next afternoon before they were carried out. The plaintiff said that he would have carried his cattle back to the pasture if the agent had not told him that the through freight train would stop and take them up. It was shown on the part of the railway company that the agent did not make a positive promise to take the cattle that night but that he told the plaintiff he would take them if he could get the train to stop. It is contended by counsel for the railway company that this case is ruled by *Chicago & Alton Railroad Co. v. Kirby*, 225 U. S. 155, in which it was held that to guarantee a particular connection and transportation by a particular train amounts to giving a preference when not open to all, and provided for in the published tariff, and under the Elkins act is an illegal discrimination.

We do not think the facts bring the case within the principles of law decided there. The present case is controlled by *St. Louis & San Francisco Rd. Co. v. Vaughan*, 88 Ark. 138, where it was held: "Evidence that a railroad station agent informed a shipper of live stock that he could get his cattle moved right away, upon which he relied and left his cattle loaded in the cars for over ten hours on a cold rainy night in midwinter, before they were moved, instead of taking them out and caring for them during the delay, as he would otherwise have done, and that the cattle were materially injured by the delay was sufficient to sustain a finding that the railroad company was negligent."

The plaintiff predicates the negligence of the railroad company upon the fact that he was told by the agent

that a through freight would stop during the night and carry his cattle, that relying upon this promise he loaded part of his cattle in the car and by directions of the agent left the others in a pen ready for loading; that there were no troughs in the pen so that cattle might be fed and watered; that he would have carried the cattle back to the pasture had he not have been assured by the defendants' agents that the cattle would be picked up by the train passing that night. The railway company had knowledge of the movements of its own trains and knew which of them carried cattle. This fact was unknown to the plaintiff, and he had a right to rely upon the statements of the agent in this regard. Hence the railroad company will be responsible for the loss to the cattle because of its negligence in the respects named. *Chicago, Rock Island & Pacific Ry. Co. v. Butler*, 59 A. L. R. 39.

It is next contended by counsel for the defendant that the verdict is excessive. The plaintiff and other witnesses who testified in his behalf on the question of damages to the cattle were experienced cattle men. They did not weigh the cattle to ascertain their shrinkage but on account of their experience they could know by looking at the cattle about how much they had lost in weight. They testified in detail how much the cattle would reduce in weight by waiting there the length of time in question without being fed and watered. They also testified that it would take a week with proper feeding and watering for them to regain their lost weight. They gave in detail the average amounts each of the cattle would be reduced in weight by the delay and the aggregate amounted to \$180. The verdict of the jury was for \$150. Hence it can not be said that the verdict was excessive.

The judgment will be affirmed.

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MORRIS v. RAYMOND.

Opinion delivered February 18, 1918.

1. **WILLS—APPEAL FROM JUDGMENT OF PROBATE COURT—TIME FOR APPEAL.**—The probate court admitted a will to probate, the daughter of the testator appealed to the circuit court. *Held*, the appeal was taken in apt time when taken more than six months, but less



than one year from the date of the rendition of the judgment by the probate court.

2. **APPEAL AND ERROR—FAILURE TO SET OUT INSTRUCTIONS IN ABSTRACT.**—All instructions must be set out in the abstract; and when not set out, errors will not be considered unless the instructions are so inherently defective that they could not be cured by others.
3. **APPEAL AND ERROR—ABSTRACT INSTRUCTIONS—CURE OF ERROR.**—Appellant can not complain of an instruction given at appellee's instance, as abstract, if appellant asked, and the court gave an instruction bearing upon the same subject.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little*, Judge; affirmed.

*Fred A. Snodgrass*, for appellants.

1. The appeal was properly dismissed, as it was taken more than six months after the judgment in the probate court. Kirby's Digest, § 1348; Acts 1909, p. 956; 99 Ark. 60.

2. The question of mental capacity is eliminated by the verdict.

3. No undue influence is proven. No domination or control over the mind of the testator amounting to deception or coercion is shown. 48 S. E. 306; 153 Mo. 276; 154 *Id.* 545; 189 *Id.* 677; 47 S. E. 442; 18 Mass. 410.

4. The court erred in its instructions. Old age, physical infirmities and even partial eclipse of the mind would not prevent one from making a valid testament, if he knew and understood what he was doing. 49 Ark. 367; 66 *Id.* 623. Nor is old age and feebleness of mind sufficient to justify an inference of want of testamentary capacity. 59 N. Y. 421. See also 160 Mo. 570; 92 N. W. 1006; 106 N. W. 326; 98 N. Y. S. 438. A person does not have to be possessed of more than ordinary mind to make a will. If he understands his business and has sufficient memory to remember persons naturally the objects of his bounty, their deserts, as well as needs, what he has done for them and the amount and condition of his property, he is competent to make a will. Rood on Wills, § 3; 67 Pac. 737; 21 Am. St. 85; 47 *Id.* 352; 68 N. E. 271; 74 *Id.* 760; 9 Pac. 272; 69 N. E. 237; 56 Pac. 385; 18 *Id.* 6; 60 *Id.* 527; 42 Mich. 232.

There was no undue influence. 18 Mass. 410; 1 S. W. 974; 25 *Id.* 506; 120 Mo. 252; 45 S. W. 1077; 117 *Id.*

4; 207 Mo. 420. Affection, persuasion or fair argument do not constitute undue influence. 88 S. W. 696; 47 *Id.* 442; 68 N. E. 1068; 104 N. W. 452; 110 Me. 156; 105 N. W. 110; 59 Atl. 661; 72 Conn. 305; 78 N. E. 1. Fraud or undue influence must be proven. 87 Ark. 148; 103 *Id.* 236. See also 76 Am. St. 927.

*Ira D. Oglesby*, for appellee.

1. Appellants have failed to comply with the rules of this court. The abstract does not set out the motion for new trial, nor the evidence nor the instructions. *Queen v. Royal*, 102 Ark. 95.

2. The appeal was in time. Kirby's Digest, § § 8028-9; 99 Ark. 56; 89 *Id.* 554; 103 *Id.* 209; 127 *Id.* 266.

3. The instructions are not set out in the abstract, but there is no error in them. 80 Ark. 356. The court will presume that the jury were properly instructed. 92 Ark. 245; 81 *Id.* 327, 508. The burden was on appellants. The law as to mental capacity and undue influence was correctly announced. 80 Ala. 129; 14 Fed. 902. See also 29 S. W. 587; 5 Mo. App. 390; 84 Mo. 455; 21 Am. St. 85; 19 Ark. 533; 15 *Id.* 602; 19 *Id.* 533; 40 Cyc. 1151-2; 100 Am. Dec. 320; 37 Mo. App. 163.

4. Appellants did not ask a peremptory instruction or demur to the evidence and can not raise the question now. 162 Pac. 1094; 160 *Id.* 481; 130 *Id.* 157; 117 *Id.* 302; 42 S. W. 843; 72 N. E. 1066; 77 *Id.* 139; 45 N. Y. 628; 59 Pac. 808.

5. On the cross-appeal of appellee. The testimony was sufficient to submit to the jury the testamentary capacity of the testator. There was error in the instructions and admissions of testimony. 119 Ark. 434.

HART, J. This appeal involves the contest of the last will and testament of E. C. Brogan, deceased. The probate court admitted the will to probate and Mrs. A. H. Raymond, the daughter of said testator, appealed to the circuit court. In the circuit court the jury found in favor of the contestants as to the two items of the will in which the proponents were chiefly interested.

From the judgment rendered, the proponents of the will have duly prosecuted an appeal to this court.

The appeal from the probate court to the circuit court was taken more than six months after the rendition of the judgment admitting the will to probate, but within less than one year from that date.

The question of whether or not the appeal was taken too late depends upon what statute regulates the taking of appeals from the probate court to the circuit court in the matter of proving wills and contesting their probate. In *Hogane v. Hogane*, 57 Ark. 508, it was held that the act of April 16, 1873, abolishing the probate court and giving original jurisdiction to the circuit court in all matters relating to the probate of wills impliedly repealed section 8029 of Kirby's Digest, being that provision in section 513 of the Civil Code regulating appeals to the circuit court from an order admitting a will to record or rejecting it. The court further held that having been thus repealed, the mere adoption of the Constitution of 1874 did not revive this provision. Hence the general statute regulating the time in which appeals may be taken from judgments of the probate court to the circuit court is applicable to this case. Act 327 approved May 31, 1909, amends section 1348 of Kirby's Digest relating to appeals from the probate court to the circuit court. Acts of 1909, page 956.

Section 1348 of Kirby's Digest reads as follows:

"Appeals may be taken to the circuit court from all final orders and judgments of the probate court at any time within twelve months after the rendition thereof by the party aggrieved filing an affidavit and prayer for appeal with the clerk of the probate court, and upon the filing of such affidavit the court shall order an appeal at the term at which such judgment or order shall be rendered, or at any term within twelve months thereof. The party aggrieved, his agent or attorney, shall swear in said affidavit that the appeal is taken because he verily believes that he is aggrieved, and is not taken for the purpose of vexation or delay."

The Legislature of 1909 amended this section by adding thereto the following: "And any heir, devisee, legatee or judgment creditor of an estate, who feels aggrieved, may at any time within six months after the ren-

dition thereof prosecute an appeal to the circuit court from any final order of judgment of the probate court, by filing an affidavit and prayer for appeal with the clerk of the probate court," etc.

In *McKenzie v. Crowley, Admr.*, 119 Ark. 185, we said that the amendment to section 1348 of Kirby's Digest made by the Legislature of 1909 should be construed to apply only to those classes whose right of appeal was created by the act. When section 1348 of Kirby's Digest is read in connection with the amendment made by the Legislature of 1909, it is manifest that the Legislature intended to give the right of appeal to certain classes of persons who did not have that right and that it did not intend to shorten the time of appeal to those already possessing the right under section 1348 of Kirby's Digest. In *Ouachita Baptist College v. Scott*, 64 Ark. 349, it was held that where a will is admitted to probate in common form in the probate court, without notice to interested persons, they may make themselves parties by perfecting an appeal to the circuit court, in order to contest the will. Under this decision appellee, being the daughter of the testator, had the right to appeal under section 1348 of Kirby's Digest and as above stated we do not think the Legislature of 1909 intended to cut down that time from one year to six months. We are of the opinion, therefore, that the appeal was taken within time.

(2) It is insisted by counsel for appellants that the court erred in giving several instructions at the request of appellee. None of the instructions given except one are set out by counsel for appellants in his abstract and brief. It is the settled rule in this State that assignments of error relating to the giving of instructions can not be considered on appeal when all of the instructions are not set out in the abstract unless the instructions complained of are so inherently defective that they could not be cured by others. *Harretson v. Eureka Springs Electric Co.*, 121 Ark. 269; and *Barnett Bros. v. Western Assurance Co.*, 126 Ark. 562. We find none of the instructions of which counsel for appellants complained to be so defective that, even if they are considered incorrect, the defects might not have been cured by other instructions.

(3) It is next insisted by counsel for appellants that there was not sufficient evidence in the record to submit to the jury the question of undue influence exerted upon the testator in the execution of the will. Counsel for the appellants are in no attitude to raise this question on appeal. Instructions on the question of undue influence were given to the jury upon the request of the appellants as well as of the appellee. The objection to the instructions on undue influence was, as we have just seen, that there was no testimony upon which to predicate them. Appellants can not complain of an instruction given at appellee's instance as abstract if they ask, and the court gave an instruction bearing upon the same subject. *St. L., I. M. & S. Ry. Co. v. Baker*, 67 Ark. 531; *St. L. & S. F. Rd. Co. v. Vaughan*, 88 Ark. 138; *St. L., I. M. & S. Ry. Co. v. Carter*, 93 Ark. 589, and *National Fruit Products Co. v. Garrett*, 121 Ark. 570.

It is true counsel for appellants asked for a peremptory instruction at the conclusion of the testimony, but there was no error in the refusal of the court to grant this. The will was contested upon two grounds: First, that the testator did not have sufficient mental capacity to make a will; and, second, that the will was procured to be executed by undue influence practiced upon the testator.

It is conceded by counsel for appellants that there was sufficient testimony to take the case to the jury on the question of the mental capacity or incapacity of the testator. Hence it can not be said that the court erred in not directing a verdict in favor of appellants. We need not consider whether or not there was sufficient testimony to establish the allegations of undue influence, for as we have already seen, both parties asked for instructions on this question, and appellant can not now complain that there was no testimony upon which to predicate such instructions.

We find no reversible error in the record and the judgment will be affirmed.

## BRIGGS v. JONES.

Opinion delivered February 18, 1918.

1. **APPEAL AND ERROR—TRIAL—IMPROPER ARGUMENT—EFFECT OF REFUSAL TO ADMONISH JURY.**—The refusal of the trial court to correct counsel, where he has made an improper statement of the law in his argument, is tantamount to the giving of an erroneous instruction on the subject.
2. **ADVERSE POSSESSION—PEACEABLE POSSESSION.**—A mere quarrel over the title to land does not prevent the possession of the party in possession from being peaceable, for purposes of acquiring title by adverse possession.
3. **ADVERSE POSSESSION—PEACEABLE AND HOSTILE POSSESSION.**—The occupancy, whether denominated peaceable or hostile, must be accompanied by an intent to hold adversely to the true owner, and, while there need not be a dispute in order to make the possession hostile, the word peaceable as employed by the courts in announcing the elements of possession which may ripen into title, means that the possession must be so undisturbed as to render it continuous.

Appeal from Nevada Circuit Court; *Geo. R. Haynie*, Judge; reversed.

*J. O. A. Bush*, for appellants.

1. The appellee is barred by limitation, even if a tenant in common. 1 R. C. L. 742, par. 62; 2 C. J. 168, par. 322.
2. The argument of counsel was erroneous and prejudicial. 28 C. C. 678; 2 C. J. 68, note 33; 117 Ark. 551.

*McRae & Tompkins*, for appellee.

1. Appellee was a daughter of Scott Jones. The evidence is conclusive.
2. She is not barred. She is a cotenant with appellants and their possession was not hostile and adverse. 20 Ark. 359; 99 *Id.* 87; 61 *Id.* 541. See also 110 *Id.* 571; 65 *Id.* 442; 57 *Id.* 105; 117 *Id.* 579; 61 *Id.* 528; 99 *Id.* 84.
3. The argument of counsel was not erroneous nor prejudicial. It was invited and legitimate under the evidence and instructions.

SMITH, J. This is a suit in ejectment, and involves the title to a quarter section of land which was owned by one Scott Jones, at the time of his death. Jones died in 1884, and was survived by his widow and two daughters, whose names were Frances Briggs and Malissa Saunders, who were living with him on the land at the time of his death. The widow died in 1907, since which time the land has been in the possession of the two daughters named above. Lucy Jones brought this suit to recover an undivided one-third interest in the land, and for cause of action, alleged that she was a child of Scott Jones, born before the Civil War of a slave marriage, and, upon the trial of this issue, recovered judgment for the share sued for. It is now conceded that the evidence is legally sufficient to support the verdict on this issue, but it is alleged, as ground for the reversal of the judgment, that prejudicial error was committed in the argument of the case before the jury by counsel for plaintiff.

In defense of the suit it was not only denied that Lucy Jones was the child of Scott Jones, but it was alleged that any cause of action on her part was barred by the statute of limitations. It was conceded that the defendants had held the possession of the land for more than seven years, but it was contended that, inasmuch as the parties were tenants in common, their possession was not adverse. Lucy Jones testified that about three years before beginning this suit she demanded that her interest in the land be set apart to her, and, when the occupants denied that she had any interest, they had a fuss.

The court gave instructions correctly submitting the issues to the jury, but in his closing argument to the jury counsel for plaintiff said: "The defendants' possession of the land was not peaceable possession within the meaning of the instructions, because Lucy Jones went down there and they had a row about it." Objection was made to this argument, but the court refused to admonish the jury that counsel had not correctly interpreted the instructions on this subject. The argument was well calculated to produce an erroneous impression on the jury

and to have a highly prejudicial effect, for its meaning was that the row over the right of possession had the effect to break the continuity of the existing adverse possession and to form a new period from which the statute must run before title could thereafter be acquired by adverse possession. The refusal of the court to correct counsel in his argument was, under the circumstances, tantamount to the giving of an erroneous instruction on the subject. *Davie v. Padgett*, 117 Ark. 551.

That the argument was improper is apparent from a consideration of the cases which discuss the character of possession which may ripen into title. A number of such cases are found in our own reports. It is true that a number of these cases say this possession must be peaceable, as, for instance, in *Jeffery v. Jeffery*, 87 Ark. 496, the court said: "Plaintiffs and their ancestors must have held open, notorious, peaceable, continuous, and adverse possession of the lands for more than seven years to amount to an investiture of title." Similar language was used by Judge BATTLE in the case of *Scott v. Mills*, 49 Ark. 266. Each of these cases cite other opinions of this court to the same effect. But an equal, if not a larger, number of cases say the possession must be hostile. See *Watson v. Hardin*, 97 Ark. 33; *Nicklance v. Dickerson*, 65 Ark. 422, and cases cited in each of these cases. In the common acceptation of these words, a possession could not be, at the same time, both peaceable and hostile, yet, as anomalous as it may appear to be, the words have been used interchangeably by this court in discussing the law of adverse possession. The occupancy, whether denominated peaceable or hostile, must be accompanied by an intent to hold adversely to the true owner, and, while it is held that there need not be a dispute in order to make the possession hostile (2 C. J. 122), it is also held that the word peaceable, as employed by the courts in announcing the elements of possession which may ripen into title, means merely that the possession must be so undisturbed as to render it continuous. 2 C. J. 168.



The court should have told the jury that a mere quarrel over the title did not prevent the possession from being peaceable within the meaning of the instructions which had been given on that subject.

Other errors are assigned, but we do not think they are sufficiently meritorious to require discussion.

For the error indicated the judgment is reversed and the cause remanded for a new trial.

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COTTON v. MUTUAL AID UNION.

Opinion delivered February 18, 1918.

1. **APPEAL AND ERROR—INSUFFICIENCY OF THE ANSWER—OBJECTION ON APPEAL.**—After a cause has been tried and judgment rendered, it is too late to complain, for the first time on appeal, that the answer was defective.
2. **INSURANCE—INSURABLE INTEREST.**—A person who insures the life of another, in which he has no insurable interest, can not enforce the contract for the reason that it is a wagering contract and contrary to public policy.
3. **INSURANCE—LIFE—INSURABLE INTEREST.**—The fact that the two men are second cousins will not warrant an inference that the one has an insurable interest in the life of the other.
4. **CONTRACTS—WAGERING CONTRACT—LIFE INSURANCE POLICY.**—The courts will not enforce a wagering contract or one that is void as against public policy, irrespective of the mental attitude of either or both parties toward it.

Appeal from Searcy Circuit Court; *John I. Worthington*, Judge; affirmed.

*D. T. Cotton*, for appellant.

1. The only defense was that the beneficiary had no insurable interest in the life of the insured. This is a negative pregnant and denied nothing but indirectly alleges that appellant did have an *interest* in the life of Frank Cotton. 53 Ind. 380. It pleaded merely a conclusion of law without stating the facts. Cooley's Briefs on Insurance, 324.

2. It was not a wagering contract. Cooley, Briefs on Ins. 325; 28 S. E. 200. . The lack of insurable interest

must be raised by answer. 18 Pac. 537; 25 N. W. 620; 66 *Id.* 847; 12 La. Ann. 35.

3. The application shows that appellant was a second cousin. The company can not be heard to say it was not aware of the lack of interest. 125 Fed. 536.

4. He was entitled to recover as trustee for the heirs, etc. 96 Ky. 132; 28 S. W. 334; 100 Ky. 606; 38 S. W. 1057; 36 Atl. 981; 43 N. E. 893; 45 Am. St. 693; 75 Tex. 338; 16 Am. St. 893; 27 S. W. 286. See also 4 Zabr. 576; 52 Mo. 213.

5. Contracts of insurance in favor of one who has no insurable interest are not prohibited by law nor public policy. Cooley, Briefs on Ins. 246; 2 Duen (N. Y.) 419; 2 E. D. Smith, 268; 23 N. J. 486; 70 Md. 261; 16 Atl. 890; 2 L. R. A. 844. See also 31 Fed. 177; 77 Am. St. 350; 110 Ill. 551; 87 Am. St. 478; 9 R. I. 346; 28 S. E. 200; 55 N. Y. S. 292.

6. It is not a wagering contract. See 186 S. W. 520; 154 *Id.* 906; 150 *Id.* 649; 30 N. Y. S. 824; 19 Am. St. 376; 5 N. E. 634; 191 S. W. 529; 126 Ark. 92.

*Dick Rice*, for appellee.

1. No objection was made to the answer in the lower court. It is too late after going to trial on the merits. 35 Ark. 109; 33 *Id.* 107; 47 *Id.* 493; 78 *Id.* 53. If it stated only conclusions of law and is defective it could only be reached by demurrer or motion to make more definite and certain. 24 Ark. 260; 72 *Id.* 478. If parties treat the answer as tendering an issue and go to trial on the issue, the insufficiency of the answer can not be raised. 78 Ark. 53; 72 *Id.* 66; 92 *Id.* 208.

2. Appellant had no insurable interest. The contract was a mere wager. 98 Ark. 52; 105 *Id.* 281; 116 *Id.* 527; 25 Cyc. 703. The burden was on appellant to prove an insurable interest. 7 Enc. Ev. 499; 25 Cyc. 926; 98 Ark. 52; Ann. Cas. 1916, C 584; 23 N. Y. 516.

3. Appellant is not a trustee. The contract was void. 119 Ark. 498, 502.

HUMPHREYS, J. Appellant brought suit against appellee in the Searcy Circuit Court to recover \$79.44 on a life insurance policy issued by appellee on the 1st day of April, 1916, on the life of Frank Cotton, in which policy appellant was made the beneficiary. The policy provided that upon the death of Frank Cotton appellee would, "within thirty days after the receipt, at the home office at Rogers, Arkansas, of satisfactory proof of the death of said applicant, pay Phelps Cotton, whose address is Leslie, Arkansas, if living, if not, then to the guardian, executor or administrator of said applicant, to be held in trust for the sole benefit of the legal heirs, the sum of money herein set forth." It was alleged in the complaint that Frank Cotton died on the ..... day of September, 1916.

Appellee pleaded as one of its defenses that appellant "had no insurable interest in the life of the insured, Frank Cotton, and had no lawful right to insure the life of the said Frank Cotton and cause himself to be named as beneficiary in the certificate of insurance, and for that reason is not liable to the plaintiff on the certificate of membership sued on herein."

The cause was submitted to the court, sitting as a jury, on certain documentary evidence and an agreed statement of facts.

It was adjudged that appellant take nothing by the action, and from that judgment an appeal has been prosecuted to this court.

Appellant procured the certificate of insurance on the life of Frank Cotton, which is the basis of this action, and paid the premiums and assessments under the terms of the policy until the death of the insured. Appellant applied for the policy and signed Frank Cotton's name to the application. Appellant was twenty-nine years of age at the time he brought the suit and resided at Leslie, in Searcy County, Arkansas, four miles from the home of the insured, and was a second cousin of the insured. The application for the insurance was made in April, 1916, and the insured died in July, 1916.

(1) The cause was tried upon the issue of whether appellant had an insurable interest in the life of Frank Cotton, the insured. Appellant insists that the trial court erred in dismissing his complaint because appellee pleaded its defense of no insurable interest in the form of a negative pregnant. It is true the answer is insufficient in that it states a conclusion of law instead of stating facts from which a conclusion might be drawn, but the parties treated the issue of whether appellant had an insurable interest in the life of the insured as properly and correctly pleaded. The cause was submitted and tried upon that theory. This defect in the answer can not be taken advantage of for the first time on appeal. *J. I. Porter Lbr. Co. v. Hill*, 72 Ark. 62; *Cook v. Bagnell Timber Co.*, 78 Ark. 53. This cause was submitted upon a particular issue, so it is immaterial on appeal whether any answer was filed. *Pembroke v. Logan*, 71 Ark. 364; *Cribbs v. Walker*, 74 Ark. 104; *Ward v. Blythe*, 92 Ark. 208.

(2) Under the record in this case, the only relationship that existed between appellant and the insured, Frank Cotton, at the time the policy of insurance was issued, was that of second cousins. They did not live together. It did not appear that appellant was dependent upon the insured for support and maintenance or that the insured was indebted to him. This court is firmly committed to the doctrine that a person who insures the life of another, in which he has no insurable interest, can not enforce the contract for the reason that it is a wagering contract and contrary to public policy. *McRae v. Warmack*, 98 Ark. 52; *Langford v. National L. & A. Ins. Co.*, 116 Ark. 527; *Security Mutual Life Ins. Co. v. Little*, 119 Ark. 498.

(3) The case of *McRae v. Warmack*, *supra*, is also authority to the effect that blood relationship of uncle and nephew is not, in itself, sufficient to show an insurable interest on the part of the one in the life of the other. So it follows that the mere fact that appellant was a second cousin to the insured will not warrant an inference that he had an insurable interest in the life of the insured.

(4) It is said by appellant, however, that appellee is estopped to avail itself of the plea of "no insurable interest" because it knew that they were only cousins at the time the policy was issued. This court is committed to the doctrine that it will not enforce a wagering contract. It has announced in unmistakable terms that the courts of this State will not aid either party in enforcing a contract which is void as against public policy. *Security Mutual Life Ins. Co. v. Little*, 119 Ark. 498.

It is insisted by appellant that he should be treated as a trustee for the legal heirs of the insured for the reason that the contract provides that in case appellant should die before the insured, then the appellee should pay the insurance to the guardian, executor or administrator of the insured, to be held in trust for the sole benefit of the legal heirs of the insured. The contingency provided by the contract never happened. The insured died before the beneficiary, and this is a suit by the beneficiary against the insurance company upon the primary undertaking in the contract. Appellant brought this suit for himself, and he can not recover on a contingency which has never happened.

No error appearing in the record, the judgment is affirmed.

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THE LEE HARDWARE Co., LIMITED, v. JOHNSON.

Opinion delivered February 18, 1918.

1. **APPEAL AND ERROR—MOTION TO DISMISS APPEAL—FACTS OUTSIDE THE RECORD.**—Under Kirby's Digest, section 1227, evidence of facts outside the record, occurring after the rendition of the judgment, and showing that appellant's further right of prosecuting an appeal has ceased, may be received and considered by this court on a motion to dismiss an appeal.
2. **ATTACHMENT SALES—NECESSITY OF CONFIRMATION.**—Under Kirby's Digest, section 385, attachment sales are subject to confirmation by the court. The contract of sale is not complete until the bid of the purchaser is accepted by the court, and until acceptance there can be no enforcement of the contract by either party.

3. **APPEAL AND ERROR—DISMISSAL OF APPEAL.**—It is not the policy of the law with respect to litigated cases to decide questions which have ceased to be an issue by reason of facts having intervened rendering their decision of no practical application to the controversy between the litigants.

Appeal from Columbia Chancery Court; *James M. Barker*, Chancellor; affirmed.

*McKay & Smith*, for appellant.

1. The deed was never delivered. 8 R. C. L. 973-4; 77 Ark. 89. Recording a deed merely raises a presumption of delivery, which may be rebutted. Delivery is a mixed question of law and fact. The test is whether the grantor by his acts, words or both intended a delivery. 8 R. C. L. 976; 77 Ark. 89; 108 *Id.* 53; 110 *Id.* 70; 111 *Id.* 314; 113 *Id.* 289.

2. The conveyance was a secret trust for the benefit of M. M. Johnson and fraudulent and void as to creditors. 33 Ark. 328; 74 *Id.* 186; 52 *Id.* 458; 86 *Id.* 225; 20 Cyc. 562-5-6; Bump. Fr. Conv. (4th Ed.), 222; 50 Ark. 289; 72 *Id.* 58; 74 *Id.* 186 and cases cited *supra*.

*Stevens & Stevens*, for appellees.

1. The deed was delivered. 77 Ark. 92; 97 *Id.* 283; 108 *Id.* 57; 111 *Id.* 314, 321; 113 *Id.* 289.

2. The deed was not fraudulent nor made to hinder and delay creditors. 56 Ark. 238; 96 *Id.* 538. No fraud was proven. The debt here was made after the deed was executed and delivered for record.

**HUMPHREYS, J.** Appellant instituted suit on the 23rd day of July, 1915, against appellees in the Columbia Chancery Court to cancel a deed executed by M. M. and S. E. Johnson to J. J. Johnson, on the 24th day of December, 1900, to the following lands, to-wit: N.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  less three acres in the N. W. corner of said 80-acre tract, Sec. 23, T. 18 S., R. 22 W., in Columbia County, Arkansas; and a deed of trust executed by J. J. Johnson and Effie Johnson, his wife, to N. E. Wise, trustee for S. E. Johnson. It was alleged that the deed was voluntary and made in fraud of the rights of existing and sub-

sequent creditors; and that the deed of trust was without consideration, but if there was a valuable consideration, it was made to hinder and delay the creditors of M. M. Johnson and Mrs. S. E. Johnson participated in the fraud. On the same day, appellant filed a *lis pendens* notice in accordance with the statute.

On the 19th day of October, 1915, appellees filed answer controverting the material allegations of the bill.

The cause was heard by the court upon the pleadings and depositions of M. M. Johnson, J. J. Johnson, S. E. Johnson and R. E. Hayes, and a decree rendered dismissing the bill for want of equity, from which an appeal has been properly prosecuted to this court.

M. M. and S. E. Johnson are the father and mother of J. J. Johnson, J. W. Johnson and Minnie Cherry. The land in question was the property of M. M. Johnson, and he and his wife conveyed it by deed of gift to their son, J. J. Johnson, on the 24th day of December, 1900. J. J. Johnson was six or seven years of age at that time. M. M. Johnson recorded the deed the date it was executed and the original remained in the clerk's office from that time until after the institution of this suit. A short time before this conveyance was made, M. M. Johnson gave J. W. Johnson and Mrs. Minnie Cherry an 80-acre tract, each. He afterwards sold a 40-acre tract to J. W. Johnson. This comprised all his real estate except a 40-acre tract, which afterwards forfeited for taxes, and his home place of 84 acres which he still owns. Touching his financial condition at the time of this conveyance, M. M. Johnson testified, in substance, that he had borrowed some money and owed a few small accounts; that he had been sued for an amount he did not owe, but that he paid it, and was in condition to pay any other amount he owed; and that he was not involved at the time as surety for his brother. Mrs. S. E. Johnson testified that when they moved to Minden, Louisiana, her husband was indebted to John Souter and that she secured this indebtedness by a mortgage on an 80-acre tract of her own land. She had inherited 240 acres from her father's estate. Some

time after this, M. M. Johnson moved with his family to Minden, Louisiana, where he remained for about nine years. While there, he farmed and ran a small grocery store and cold drink stand. He then returned with his family to Columbia County, where they now live. In 1914, M. M. Johnson obligated himself as surety for his brother in the purchase of some gin machinery. He had purchased a place for \$750 when he went to Minden, which was sold for \$350 and applied to that indebtedness, leaving a balance of \$750 due appellant. Appellant procured a judgment for that amount against M. M. Johnson in Louisiana, on the 29th day of January, 1915, and brought a suit on that judgment March 16, 1915, in the circuit court of Columbia County, Arkansas, and later procured a judgment thereon. This suit was brought for the purpose of subjecting the property in question to the payment of that judgment. In 1907, M. M. Johnson and his wife sold the timber on the land in question and executed a timber deed in which they covenanted that they were the owners of the land in fee. On January 20, 1914, J. J. Johnson and wife executed a mortgage on said real estate to Mrs. Sarai Emerson for \$150, due one year after date. On January 19, 1915, they executed a deed of trust to N. E. Wise, as trustee for Mrs. S. E. Johnson, for \$300, in order to raise money to pay the Emerson mortgage and to pay an indebtedness J. J. Johnson owed the Turner Hardware Company, which last amount had been reduced to judgment and was a lien on said property. After judgment had been obtained against M. M. Johnson in the circuit court, and about the time this suit was instituted, but before J. J. Johnson had actual knowledge of the pendency of the suit, he and his wife conveyed said real estate to his mother for \$1,150 in settlement of the deed of trust theretofore executed to her and in payment of a \$500 loan she had made him several years before for the purpose of going into business. Just prior to this time, J. J. Johnson had contracted a sale of the land to Luther Hunt for \$1,150 but Hunt declined to consummate the deal when he ascer-



tained that the Turner Hardware Company had a judgment lien against the property. While in Minden, Mrs. S. E. Johnson exchanged an 80-acre tract of her individual land by oral contract with her son, J. W. Johnson, for the 80-acre tract M. M. Johnson had given him. Before the deeds were executed, M. M. Johnson and wife sold the pine timber on the 80-acre tract he had given his son, J. W. Johnson, and covenanted that they were the owners in fee of the land. J. W. Johnson sold the timber on the 80-acre tract he had exchanged for this tract. They later made deeds in keeping with the exchange agreement. When J. J. Johnson became twenty-one years of age, his father paid him \$200 for the timber he had sold off the 80-acre tract he had given him, but was not certain whether he received \$200 or \$300 for the timber. M. M. Johnson paid all the taxes on the tract and controlled the lands and collected the rents until three or four years before the institution of this suit. When J. J. Johnson reached the age of eighteen or nineteen years, he assumed control of the place and appropriated the rents to his own use. The place was known as J. J. Johnson's by the members of the family and B. E. Hayes who rented it from J. J. Johnson for three or four years. No manual delivery of the deed was ever made. M. M. Johnson testified that he gave the infant son this land to equalize the gifts he had made to his grown children. He and his wife both testified that it was his intention to give J. J. Johnson the land in question. J. J. Johnson testified that he understood from childhood that the land had been deeded to him and that it belonged to him.

(1-2) It is first insisted that the deed was not delivered, and, therefore, ineffectual. Manual delivery of a deed by the grantor and a formal acceptance by the grantee is not necessary to constitute a delivery of an instrument in law. The delivery is sufficient if it is manifest that the grantor intended to part with the deed as an effective conveyance. 8 R. C. L. 976; *Russell v. May*, 77 Ark. 89; *Stephens v. Stephens*, 108 Ark. 53; *Felker v.*

*Rice*, 110 Ark. 70; *May v. State Natl. Bank*, 59 Ark. 614; *Colquitt v. Stevens*, 111 Ark. 314; *Faulkner v. Feazel*, 113 Ark. 289. M. M. Johnson executed this deed and placed it of record, and the original deed remained in the clerk's office for sixteen years. This fact alone is a very strong circumstance indicating that he intended to release all control over the deed. Under the rule laid down by this court, the act of recording the deed raised a *prima facie* presumption of delivery which could not be overthrown by other than clear, convincing evidence. He had given his grown children, each, real estate and personal property equal in value to this 77-acre tract. It is quite natural that he and his wife should want to give their youngest son a farm also. Their statement to the effect that they intended the conveyance as an absolute gift is in keeping with human nature. It is not out of the ordinary for a father to control and manage the real estate of his minor children and to appropriate the rents and profits in excess of improvements, taxes, etc., where he is educating and maintaining the children. It is undisputed that he accounted to his son for the value of the timber sold. The Turner Hardware Company collected a debt from J. J. Johnson by proceeding against this property. J. J. Johnson executed a mortgage upon it to Mrs. Emerson, and afterwards to his mother to raise money to pay Mrs. Emerson and the Turner Hardware Company. He contracted a sale for this property to Luther Hunt for \$1,150 and executed a deed to him but did not deliver it for the reason that Hunt decided not to buy it after he discovered the judgment lien in favor of Turner Hardware Company. He then sold it outright to his mother, without any actual knowledge on his part that the appellant was trying to subject it to the payment of his father's debt.

(3) We do not think that the facts and circumstances in this case, tending to establish a delivery of the deed in question, are overthrown by the showing that the father remained in possession of and controlled the land until his son reached the age of nineteen years, and sold

the timber thereon, for which he afterwards accounted, and that the tract conveyed to the other son finally found its way back to the mother.

But it is insisted that the conveyance to J. J. Johnson of the land in question was a fraud upon existing and subsequent creditors of M. M. Johnson.

In order to avoid a voluntary conveyance in favor of a subsequent creditor, an intention to defraud either existing or subsequent creditors must be proved by the facts and circumstances surrounding the transaction. The time elapsing between the date of the conveyance and creation of the debt may be considered in connection with the other circumstances in proof to ascertain whether a voluntary conveyance injured or defrauded a subsequent creditor or creditors. Existing creditors may be denied relief if they delay too long. *May v. State Natl. Bank*, 59 Ark. 614.

The only evidence tending to show that M. M. Johnson conveyed the property in question to defraud creditors appears in his own and wife's evidence. He testified that at the time he made this conveyance he had some money borrowed and that a suit was pending against him. He testified, however, that at the time he made the conveyance complained of, he owned forty acres aside from his homestead which afterwards forfeited for taxes, and that he owned considerable personal property in the way of cattle, etc.; that he paid the debt upon which he was sued, although he did not regard it as a personal obligation; that he owed only a few accounts which he paid the following fall; and that he had ample to take care of his debts.

Mrs. S. E. Johnson testified that when they started to move to Minden, Mr. Johnson owed John Souter a debt which she secured by mortgage on an individual 80-acre tract of land. Even if these facts were sufficient to establish actual fraud, which we doubt, it is quite certain, when considered in connection with the lapse of time between the date of the conveyance and the creation of

appellant's claim, that appellant was not injured or defrauded by the conveyance.

Under the facts and circumstances in this case, it is quite apparent that there is no equity in the bill. The decree of the chancellor in dismissing the bill for want of equity is affirmed.

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QUELLMALZ LUMBER & MANUFACTURING COMPANY v. DAY.

Opinion delivered February 18, 1918.

1. **DEEDS—DELIVERY—MANUAL DELIVERY.**—Manual delivery of a deed by the grantor and a formal acceptance by the grantee is not necessary to constitute a delivery of an instrument in law; the delivery is sufficient if it is manifest that the grantor intended to part with the deed as an effective conveyance.
2. **DEEDS—DELIVERY—EFFECT OF RECORD.**—The act of recording a deed raises a *prima facie* presumption of delivery which can not be overthrown by other than clear and convincing evidence.
3. **DEEDS—DELIVERY—INTENTION AND ACTS OF THE PARTIES.**—A father deeded land to his minor son whom he was providing for and educating. The deed was recorded but never manually delivered to the son. *Held*, the facts tending to establish a delivery of the deed to the son were not overthrown by proof that the father remained in possession of and controlled the land until the son reached the age of nineteen years, and that he conveyed the timber thereon, afterwards accounting for the same.
4. **FRAUDULENT CONVEYANCES—EXISTING AND SUBSEQUENT CREDITORS—VOLUNTARY CONVEYANCE.**—In order for a subsequent creditor to secure the avoidance of a voluntary conveyance, an intention to defraud existing or subsequent creditors must be proved by the facts and circumstances surrounding the transactions; the time elapsing between the date of the conveyance and creation of the debt may be considered in connection with the other circumstances in proof to ascertain whether a voluntary conveyance injured or defrauded a subsequent creditor or creditors. Existing creditors may be denied relief if they delay too long.

Appeal from Clay Circuit Court, Western District;  
*R. H. Dudley*, Judge; appeal dismissed.

*C. T. Bloodworth*, for appellant.

1. Argues the merits of the suit submitting that replevin did not lie for property seized under a valid

judgment and sold under a valid order of sale. 94 Ark. 384; Kirby & Castle's Digest, § 8426.

2. The court erred in the admission and exclusion of testimony.

3. There was error in the instructions. The property was legally sold and reported and the sale confirmed. 64 Ark. 96; 90 *Id.* 166; 82 *Id.* 414; 77 *Id.* 216; 24 Cyc. 72 E.; 35 Ark. 445.

4. The verdict is contrary to the law and the evidence.

*G. B. Oliver*, for appellee.

1. Argues the merits of the cause, citing many authorities.

2. The appeal should be dismissed. The sale was set aside and no appeal was taken. The judgment is final. Kirby's Digest, § 1227; 106 Ark. 292; 53 *Id.* 514; 76 *Id.* 507; 78 *Id.* 388, etc.

HART, J. T. E. Day sued the Henry Quellmalz Lumber & Manufacturing Company in replevin to recover forty-two stacks of lumber containing about 95,000 feet and alleged to be of the value of \$1,000.00. The Lumber & Manufacturing Company defended on the ground that it had bought the lumber at an attachment sale made after the attachment of the lumber had been sustained and judgment had been rendered against Day in favor of the Federal Lumber Company. The material facts are as follows:

In the fall of 1914, the Federal Lumber Company sued T. E. Day on an account and had an attachment issued on the ground that Day was a non-resident of the State of Arkansas. The attachment was levied on the lumber in controversy which was stacked on his mill yard. In December, 1914, Day was in the State of Arkansas and the Federal Lumber Company obtained personal service upon him. The Federal Lumber Company obtained judgment against Day for the amount sued for and the attachment was sustained. The lumber in con-

troversy was advertised to be sold under the attachment on the 12th day of February, 1915.

According to the testimony of Day, on the Saturday before the sale was to occur, he arranged with the attorney of the Federal Lumber Company to draw a draft on him for the balance of the judgment against him and to stop the sale. Thinking this arrangement would be carried out, he paid no further attention to the matter and was not present on the day of the sale. The Federal Lumber Company proceeded with the sale on the 12th day of February, 1915, and the Henry Quellmalz Lumber & Manufacturing Company became the purchaser of the lumber at the sale, for the sum of \$214.00. This amount was immediately paid to the constable who turned the property over to the defendant in this action. On Monday the 15th of February, 1915, the defendant began to move the property. On the 16th day of February, 1915, Day instituted this action in replevin to recover the lumber. A forthcoming bond was given by the defendant and it retained possession of the lumber and sold it. A report of sale was filed in the justice court on March 20, 1915, and on the same day Day filed his exceptions to the report which were overruled by the court and the sale approved. On March 25, 1915, Day filed an affidavit for appeal. His appeal was granted and the transcript lodged in the circuit court on the 27th day of March, 1915. The defendant adduced evidence in the court below to show that the agent of Day knew that the sale was to take place on the day advertised and invited it to bid at the sale. There was a trial before a jury and a verdict was rendered in favor of Day for the 100,000 feet of lumber sued for and its value fixed at \$602.40, after deducting the amount paid by the defendant at the sale. Judgment was rendered in favor of the plaintiff against the defendant for this amount on the 3d day of April, 1917, which was the 2nd day of the term. On September 24, 1917, the defendant prayed an appeal to the Supreme Court which was granted by the clerk of the court. On the 26th day of November, 1917, the appellee filed a

motion under Section 1227 of Kirby's Digest to dismiss the appeal on the ground that the appellant's right of further prosecuting the sale had ceased. In support of his motion the appellee introduced a certified copy of the circuit court order sustaining his exceptions to the report of the sale of the lumber and ordering that the sale be set aside and held for naught. This judgment of the circuit court was rendered on the 11th day of April, 1917, being the 9th day of the April term. No appeal was taken from that order. A consideration of the motion was deferred by this court until the case on appeal was ready for hearing.

Counsel for appellant in his brief has not questioned the finding of the jury on the value of the lumber in controversy but seeks to reverse the judgment on the ground that the sale under which it purchasd was a valid one.

(1) It becomes our duty first to dispose of the motion to dismiss the appeal. Under Section 1227 of Kirby's Digest evidence of facts outside the record, occurring after the rendition of the judgment, and showing that appellant's further right of prosecuting an appeal has ceased, may be received and considered by this court on a motion to dismiss an appeal. *Hopson v. Frier-son*, 106 Ark. 292; *Bolen v. Cumby*, 53 Ark. 514.

(2-4) It will be remembered that the judgment in the present case was rendered on the 3d day of April, 1917, and that the judgment sustaining exceptions to the sale of the lumber under the order from the justice of the peace and setting the sale aside was made on the 11th day of April, 1917. No appeal has been taken from that order. The sole question to be determined in this appeal is as to whether or not the lumber belongs to Day. Adjudication of the question was settled against the appellant by the order setting aside the sale of the lumber which was rendered subsequent to the judgment in the present case. That adjudication is conclusive against the appellant and bars the further prosecution of his appeal. It was a final adjudication of the only question which is sought to be determined by this appeal. *Church*

v. *Gallic*, 75 Ark. 507; *Jenkins v. Jenkins*, 78 Ark. 388. But it is insisted that appellant was not a party to that proceeding and is not bound by it. The appellant became a party to that proceeding when he purchased the lumber at the sale. *Porter, Taylor & Co. v. Hanson et al.*, 36 Ark. 591; and *Miller v. Henry*, 105 Ark. 261. Attachment sales are by the terms of our statutes subject to confirmation by the court. Kirby's Digest, Sec. 385. The contract of sale is not complete until the bid of the purchaser is accepted by the court, and until acceptance there can be no enforcement of the contract by either party. *Freeman v. Watkins*, 52 Ark. 446; *Kenady v. Gilkey*, 81 Ark. 147, and *Miller v. Henry*, 105 Ark. 261. Therefore, the appellant became a party to the attachment proceedings when it purchased the lumber under the attachment sale. The fact that the costs of the litigation will fall upon the appellant does not afford a sufficient reason why the court should decide the questions raised by the appeal. It is not the policy of our law with respect to litigated cases to decide questions which have ceased to be an issue by reason of facts having intervened rendering their decision of no practical application to the controversy between the litigants. *Pearson v. Quinn*, 113 Ark. 24; *Tabor v. Hipp*, 136 Ga. 123, Ann. Cases, 1912, C. 246.

It follows, therefore, that the appellant's right of further prosecuting the appeal in this case has ceased. It will therefore be dismissed. It is so ordered.

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### HENDRIX v. BLACK.

Opinion delivered February 18, 1918.

1. **TRESPASS—LIABILITY OF ONE WHO AUTHORIZES ANOTHER TO COMMIT A TRESPASS.**—One who authorizes the commission of a trespass is equally responsible with him by whose act the trespass is committed.
2. **TRESPASS—SALE OF TIMBER UPON LAND OF ANOTHER.**—Appellant was in the business of purchasing tax titles and selling the timber rights on the land so purchased. He purchased land belonging to appellee under a void tax sale and sold the timber thereon to one



A., who cut it. *Held*, appellant was on notice of appellee's title, and was liable to appellee for damages.

3. **TRESPASS—CUTTING TIMBER ON ANOTHER'S LAND.**—A person who sells the right to cut timber on the land of another without the latter's consent, is liable for the trespass committed by his purchaser in cutting and removing the timber, and a claim of color of title (such as a void tax deed) is no justification.
4. **PENALTIES—EQUITY JURISDICTION.**—Equity will not aid in the enforcement of penalties.

Appeal from Ashley Chancery Court; *Zachariah T. Wood*, Chancellor; affirmed.

*U. J. Cone*, for appellant.

1. Appellant claimed and sold the timber in good faith under a tax deed. He had no notice of the confirmation of appellee's title, or that his tax deed was void.

No fraud is proven nor conspiracy to defraud shown. The claim for damages is not sustained by the evidence. 8 Cyc. 622, 647 C, 658, 691-2; 19 Ann. Cases, 1254 and note; 20 Ark. 224; 3 Enc. Ev. 434 and notes 88, 89, 90; 16 Ind. 512; 5 Ann. Cas. 374; 50 Vt. 494; 11 *Id.* 615; 76 N. Y. 284; 47 Mich. 572; 15 N. Y. S. 528.

*Williamson & Williamson*, for appellee.

1. The decree and findings are correct as to the title. 94 Ark. 58; 98 *Id.* 266. Appellant's tax title was void and so declared by the court. He was a party and bound by the confirmation decree and can not impeach it collaterally. Kirby's Digest, § 4425 and note (e); 125 Ark. 301; 121 *Id.* 474.

2. He was liable for the trespass. 18 Tex. 228; 90 S. W. 860; 15 Ark. 452; 116 *Id.* 206; 38 Cyc. 1041 and notes; 43 Ark. 449; 129 N. C. 149; 39 S. E. 746; 22 Vt. 338; 78 Me. 260; 97 Ala. 627; 92 Ky. 574; 17 Minn. 200; 23 Mo. 434; 12 Wend (N. Y.) 39; 123 Penn. St. 62; 10 Am. St. 512.

3. The evidence is sufficient to sustain the findings. 95 Ark. 482; 1 Enc. Dig. Ark. Rep. 377-8.

4. Treble damages should have been allowed for the wilful trespass. Kirby's Digest, § 7976-8; 123 Penn. St. 62; 10 Am. St. 512; 96 Ark. 87; 116 *Id.* 206.

WOOD, J. Appellee instituted this suit against the appellant, alleging that during 1912 and until July 18, 1913, he was the owner in fee of a certain tract of land in Ashley County, Arkansas, on which last named date he sold the land in suit, together with other lands, to one Josiah Grace; that Hendrix had asserted some claim of title to the land, and that in January, 1913, the appellee had instituted suit for confirmation of title and had made Hendrix a party to the suit; that Hendrix, with full knowledge of appellee's title and knowing that he himself had no title to the lands, had entered into a conspiracy with one E. D. Edwards to defraud appellee; that in pursuance of such conspiracy Hendrix conveyed the land, or the timber thereon, to Edwards in order to enable Edwards to cut and remove the timber under pretense of being the owner thereof; that Edwards was insolvent and Hendrix well knew such to be the fact; that on the 28th day of May, 1913, appellee procured a decree of confirmation quieting title in him; that notwithstanding this fact, Edwards and his employees, at the instigation of Hendrix, cut and removed timber from the land to the value of \$1,813.18; that after the land was denuded of its timber appellee's vendee, Grace, who had purchased the land, refused to keep the same and reconveyed the same to appellee.

Appellee alleged that he brought the suit in chancery court so that the fraud might be uncovered, and that the appellant Hendrix might be held to account to him for his fraudulent acts and schemes, and he prayed that a master be appointed to state an account as to the amount of timber cut through the fraudulent acts of Hendrix, and that he have a decree for his damages, and for all general and equitable relief. He prayed for treble damages.

Appellant answered separately, denying the title of the appellee and the alleged sale to Grace. He set up title in himself under the clerk's tax deed. He denied that he had been made a party to the confirmation suit of the appellee and denied the other allegations of the complaint as to conspiracy. Admitted that he had sold the

timber to Edwards, and denied that Edwards was insolvent. He admitted that a confirmation decree had been rendered in the Ashley chancery court in favor of the appellee, but alleged that appellant was not a party to the suit for confirmation, and set up that same was void and a fraud upon the appellant.

Edwards answered, denying that there was any conspiracy between himself and Hendrix to remove the timber from the land. He denied appellee's title to the land. He set up that Hendrix owned the land in controversy under a clerk's tax deed, and that on August 14, 1913, Hendrix deeded all the timber on the land to him (Edwards), and alleged that under his deed from Hendrix he had a right to cut and remove the timber from the land. He set up that Black and Grace had entered into a conspiracy to defraud him (Edwards) out of his timber and to prevent his further cutting of any timber on the land; that Black and Grace, by connivance and fraud, had procured a confirmation decree, and that he relied upon Grace's representations to him (Edwards) that he had the right to cut and remove the timber, and that Grace, by making such false representations, had prevented him (Edwards) from cutting the timber, to the latter's damage in the sum of \$500. Edwards asked that a master be appointed and for an accounting, and made Grace also a party defendant to his cross-complainant.

Grace answered the cross-complaint of Edwards, denying each and every material allegation thereof; alleged that he had no interest in the result of the suit, and prayed that the cross-complaint of Edwards be dismissed as against him, and for all proper relief.

The testimony in the record is exceedingly voluminous, and it could serve no useful purpose to set out and discuss it in detail. The facts, in brief, as we gather them from the record, are substantially as follows:

The land upon which the alleged trespass was committed is described as the southwest  $\frac{1}{4}$  of section 34, township 17 south, range 4 west. This land, in 1901, was sold for the taxes of 1900. This tax sale was void. The

county clerk, on June 23, 1903, executed to one J. C. Norman a clerk's tax deed to the land. On May 20, 1908, in a suit pending in the Ashley chancery court in which J. C. Norman was a party, the tax deed of the clerk under which Norman set up a claim of title was by decree of the court held to be void, and the title was confirmed to be in those under whom the appellee claims. Notwithstanding his tax deed was declared to be void by the chancery court, J. C. Norman thereafter assigned his certificate of purchase to the appellant Hendrix, and on the 3rd day of June, 1912, the clerk of Ashley County issued to J. M. Hendrix, as assignee of J. C. Norman, another tax deed, based on the same tax sale which the chancery court had declared to be void. This is the title under which Hendrix claims. There is in the record a decree of the Ashley Chancery Court, entered May 23, 1913, in which J. M. Hendrix was made a party. Among other things, that decree recites that J. M. Hendrix took no title by virtue of his deed from Hogan Oliver, the clerk, "and the same is hereby canceled, set aside and held for naught as a cloud upon petitioner's title." The decree further recites that "the title of said petitioner Louis C. Black, in and to these lands (the tract above described) is now unimpeachable," and appellee's title was then for the second time duly quieted and confirmed.

Hendrix testified that he was never served with process in the confirmation suit, and denied that he had entered into a conspiracy with Edwards. He stated that in 1911 and 1912 Edwards did some work for him and he owed Edwards for the work in the sum of \$160.00, and sold him the timber on the land mentioned, giving him a year in which to remove it, that being a fair value for the timber; did not know Black was claiming the land. Stated that he owned as much as 640 acres of land in two miles from the land in controversy, and had sold the timber to different parties by the thousand and by the acre, at a dollar per acre. He had owned many tracts over the country and never received over \$2.00 per acre for timber except for some very thick pine north of

Snyder. He had never been on the land before the present suit was instituted. He stated that he had paid the taxes on the land for the year 1912; that in October, 1912, he had sold the land to Charles Brown, of St. Louis. And on cross-examination he testified as follows: "I got tax deed under certificate issued to J. C. Norman and transferred to me, with other certificates aggregating about 440 acres. I have bought quite a number of tax titles in Ashley County, and am reasonably familiar with the record system. I am familiar with the methods of investigating titles to lands, have had a good deal of experience along this line. His testimony further shows that he was familiar with a set of abstract books of Ashley County. He bought, including the land in controversy, from J. C. Norman, certificates of purchase of 440 acres and did not remember the amount he paid. I did not investigate the record of the sale under which I claimed, understanding a tax sale to be good and valid until set aside by the courts." He said he had never estimated the timber or been over the land when he sold it to Edwards, and had never cleared or cultivated any of it, only owning it four or five months. Land like that is damaged by cutting to the value of the timber cut, which depends upon its grade.

On the 14th day of September, 1912, Hendrix made Edwards a quit-claim deed to the timber on the land over 12 inches in diameter. Edwards testified: Hendrix owed him \$160.00 for work and sold him the timber to pay for same. Hendrix did not have anything to do with the cutting of the timber or directing the handling of it, and never received any of the proceeds.

It thus appears that the appellant, eleven years after the void tax sale, and four years after the sale had been judicially determined and declared to be void, bought from J. C. Norman, whose deed based upon the void sale had been canceled, certificates of tax purchase including the tract of land in suit. After his purchase appellant induced the county clerk of Ashley County to

issue him a tax deed to this land based on the same sale that had been declared void.

Appellant was in the business of buying tax titles. He was familiar with the records of Ashley County, including the set of abstract books showing the land titles. He lived in Hamburg, the county seat. He made no investigation of these titles to ascertain whether the deed had already been issued or whether the deed, if issued, had already been declared void because of the void tax sale. He bought certificates of purchase calling for a large body of land. He testified that he did not investigate the records to ascertain whether any of the tax titles of land purchased by him were good. He assumed "that a tax sale is good and valid until set aside by the court."

Now, being familiar with the records and methods to be pursued for ascertaining the validity of titles in Ashley County it is obvious that if the appellant had made even a most cursory examination of the records he would have learned the facts connected with this tax title. The only fair and reasonable inference to be drawn from his testimony is that he did not make the investigation because he did not wish to do so. He was a tax title speculator buying and selling these titles and selling the timber on lands acquired through tax titles. His attitude would not have been so vulnerable nor his conduct so censurable if he had contented himself simply with buying and selling tax titles. For in that case there would not have been necessarily the intention to damage the freehold and thus injure the true owner of the land. But when appellant bought these titles without investigation and proceeded forthwith to sell the timber on the lands and to grant licenses to enter upon and denude the lands of their timber, this indicated his purpose to commit waste and trespass upon the freehold.

The appellant must be held to have had knowledge of that which the slightest diligence on his part would have discovered. The records were at hand and he was thoroughly familiar with them. Therefore under the circumstances he must be held to have known that when

he purchased certificates from Norman and when afterwards he induced the clerk to execute him a deed based on such certificate that he acquired no title. And when he granted to Edwards a license to enter upon and denude the land of its timber he must be held to have known that such license was void and conferred no rights on Edwards. In short, the facts fully justified the chancellor in finding that the acts of Edwards under the circumstances were trespasses upon the appellee's land; that these acts of Edwards were also the acts of the appellant and that the appellant through Edwards committed the trespass upon the appellee's land. "Those who authorize the commission of a trespass are equally responsible as those by whose acts the trespass is committed." *State of Maine v. Jesse S. Smith and others*, 78 Maine, 260.

In *Sanborn v. Sturtevant*, 17 Minn. 174, it is held, quoting syllabus, "One who, without the owner's consent, sells the right to cut trees standing and growing on the land of another, is liable for the trespass committed by his purchasers in cutting and removing them, and a claim or color of title (as a void tax deed), is no justification." See, also, 38 Cyc. 1041, notes, and other cases cited in the appellee's brief.

The chancellor found that the appellee was entitled to single damages against appellant and Edwards in the sum of \$1,000.00 and entered decree for that sum. The question as to the amount of the appellee's damage was purely one of fact. It could serve no useful purpose as a precedent to set out and discuss in detail the facts on this issue. The finding of the chancellor is sustained by the preponderance of the evidence.

The decree, therefore, awarding appellee single damages is affirmed.

The appellee took a cross-appeal and contends here that the court erred in not entering a decree for treble damages. But treble damages in the statute (Sec. 7976, Kirby), are in the nature of a penalty. This suit is one that was instituted in, and proceeded to final hearing be-

fore the chancery court. "Courts of equity will not aid in the enforcement of penalties." *Cooley v. Lovewell*, 95 Ark. 567, 568.

The court did not err, therefore, in not awarding the appellee treble damages. The decree of the chancery court is in all things correct and the judgment is affirmed.

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GANS v. STATE.

Opinion delivered February 18, 1918.

1. LIQUOR—ILLEGAL SALE—BONE DRY LAW—JURISDICTION OF MUNICIPAL COURT.—The municipal court has jurisdiction of causes arising under section 15, Act No. 13, Acts of 1917, known as the "Bone Dry Law."
2. LIQUOR—VIOLATION OF "BONE DRY LAW"—MISDEMEANOR.—A violation of the "bone dry" act is a misdemeanor.
3. JURISDICTION—CONCURRENT JURISDICTION—MUNICIPAL AND CIRCUIT COURTS—ILLEGAL SALE OF LIQUOR.—Jurisdiction when conferred upon one court does not operate to oust other courts, otherwise possessing it, of jurisdiction, for the reason that concurrent jurisdiction is not inconsistent.

Appeal from Pulaski Circuit Court, First Division;  
*J. W. Wade*, Judge; affirmed.

*Scipio A. Jones* and *Archie V. Jones*, for appellant;  
*W. M. Pemberton* and *Chas. Jacobson*, of counsel.

1. Under the act municipal courts have no jurisdiction. The act expressly confers jurisdiction upon the circuit court and this was intended to be exclusive and operated as a repeal of prior laws. Acts 1917; Act No. 13, the Bone-Dry Law; Const. Art. 7, § 40; Act 2, § 8; 6 Eng. 482; 16 Ark. 37; 102 *Id.* 205; 172 S. W. 272; 120 Ark. 406; 179 S. W. 813; 97 Pac. 991; 103 *Id.* 742; 66 S. E. 690; 142 N. W. 746; 74 Ky. 527; 36 Cyc. 1122, note 49; 175 S. W. 554.

*John D. Arbuckle*, Attorney General, and *T. W. Campbell*, Assistant, for appellee.



1. Municipal courts have jurisdiction. Acts 1915, No. 87, § 10, etc. There was no repeal by the Bone Dry Law. Repeals by implication are not favored. The conferring of jurisdiction on circuit courts does not deprive the municipal courts of jurisdiction. 123 Ark. 184; 8 *Id.* 9, 38; 28 *Id.* 19; Kirby's Digest, § 2083; Const. Art. 7, § § 28, 34, 40; 64 N. C. 598; 123 N. Y. 70; 127 Ind. 490; 22 Me. 146; 41 Miss. 566; 69 Minn. 499; 139 Ind. 280; 41 Ill. 326; 18 Fla. 809; 30 Cal. 573.

WOOD, J. Appellant was convicted in the municipal court of the city of Little Rock of a violation of Act 13 of the Acts of 1917, popularly designated as the "Bone Dry" law. He appealed to the circuit court and was again convicted and fined in the sum of \$100.00, from which judgment he appeals.

The only question presented by this appeal is whether or not the municipal court has jurisdiction of causes arising under section 15 of the above act. Section 15 of the act is, in part, as follows: "The circuit court held in the county from which, through which, or to which such shipments are made, shall have jurisdiction for the trial of such violations of this act and the grand jury of such counties shall be vested with inquisitorial powers over violations of this act, and the circuit judges shall call attention to this act in charging the grand jury."

By the act creating municipal courts in the city of Little Rock (Act 87, Acts of 1915) upon such courts is conferred jurisdiction "concurrent with the circuit court over all misdemeanors committed in violation of the laws of the State within the limits of the county." (Sec. 10.)

Act 13 of the Acts of 1917, under which the appellant was convicted, does not expressly designate the offenses described and prohibited by that act as misdemeanors. But section 19 of the act provides that "any person \* \* \* violating any of the provisions of this act \* \* \* shall, upon conviction, be fined not less than one hundred dollars and not more than one thousand

dollars for each offense, and may be confined not less than thirty days nor more than ninety days in the county jail."

Under our statute "Public offenses are felonies and misdemeanors. A felony is an offense of which the punishment is death or confinement in the penitentiary. All other public offenses are misdemeanors." Kirby's Digest, Secs. 1547, 1548, 1549. A violation of the "bone dry" act is therefore a misdemeanor, and under the express terms of the act creating municipal courts in the city of Little Rock such courts are given "concurrent jurisdiction with the circuit court over all misdemeanors."

Counsel for appellant urge, however, that since Act 13 of the Acts of 1917 expressly conferred jurisdiction upon the circuit courts of cases arising under the act, that this was intended by the Legislature to be an exclusive jurisdiction and operated as a repeal of the prior law conferring jurisdiction upon municipal courts of offenses arising under act 13 of the Acts of 1917.

The act under which appellant was convicted, while conferring upon the circuit court jurisdiction, did not in express terms say that it was an exclusive jurisdiction. This the Legislature would have done if it had intended to make such jurisdiction exclusive. The two acts conferring jurisdiction are not repugnant to each other, and unless they were so it is our duty to so construe them as to allow them to stand together. Repeals by implication are not favored. *Martels v. Wyss*, 123 Ark. 184.

To make the statutes harmonize, the jurisdiction conferred by the act under review on the circuit courts should be held, in the absence of express language to denote a contrary intent, to be a concurrent jurisdiction with that of the prior act conferring upon municipal courts, in such cases, concurrent jurisdiction with the circuit court. Their jurisdiction, once conferred, should not be taken away without express language indicating that such was the intention of the Legislature. It is a general rule that jurisdiction when conferred upon one

court "does not operate to oust other courts otherwise possessing it for the reason that concurrent jurisdiction is not inconsistent." *First National Bank v. Hubbard*, 49 Vt. 1; *Browning v. Smith*, 139 Ind. 280, and other cases cited in the brief of the Attorney General.

It follows that the municipal court had jurisdiction, and the ruling of the circuit court so holding was correct, and its judgment is therefore affirmed.

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DAVIES & DAVIES v. PATTERSON.

Opinion delivered December 22, 1917.

1. **SUMMARY PROCEEDINGS—ACTION BY CLIENT AGAINST ATTORNEY.**—The statute authorizing a client to proceed in a summary way on motion before the circuit court to procure judgment against his attorney for money which the attorney has received for him, was not intended as a substitute for the ordinary action for money had and received. Kirby's Digest, secs. 449 and 4480.
2. **ATTORNEY AND CLIENT—SUMMARY PROCEEDINGS AGAINST ATTORNEY FOR MONEY COLLECTED.**—Kirby's Digest, sections 449 and 4480, are intended to cover those cases only where the attorney has received or collected money for his client and makes no *bona fide* defense either in a written answer, duly verified, or by proof, in the absence of written pleadings, showing that the money is held by him upon a *bona fide* claim that he is entitled to the same for his fee, or that he is entitled to hold the same in payment or as a lien for legal services rendered his client or some other claim of set-off.
3. **ATTORNEY AND CLIENT—SUMMARY PROCEEDINGS—MONEY COLLECTED.**—In a summary proceeding wherein a client seeks to recover from his attorney money collected for him, a written answer may be filed, and where the attorney appears, and files a verified answer, which shows a meritorious defense upon its face, the court can not render summary judgment against him upon the motion of the client. In such a case the court should deny the motion and treat the proceedings as an ordinary action at law and transfer the same to the proper docket, and allow it to take its proper course as such proceeding.
4. **APPEAL AND ERROR—ERROR ON FACE OF RECORD.**—No motion for a new trial is necessary where an error appears upon the face of the record.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; reversed.

The appellants *pro se*.

1. Summary statutes of this character are highly penal and should receive strict construction. 56 Ark. 45. Defendants acted in good faith. They had a meritorious defense and set it up by answer. They had an attorney's lien, and it was error to render summary judgment. Plaintiff should have been remitted to his remedy at law. 4 Cyc. 695; Jones on Liens (3d Ed.), § 151; 19 Pa. St. 95; 14 Phila. 287; 87 N. Y. 550; 83 Ill. 194; 10 Vt. 183; 78 Ind. 225; 14 Iowa, 286; 67 Ga. 329; 70 *Id.* 349; 10 Wall, 483; 2 Ark. 512, 570; 30 *Id.* 761; 29 *Id.* 99; 25 *Id.* 462; 40 *Id.* 377; 14 L. R. A. (N. S.) 1101; 1 Cyc 984.

2. No motion for new trial was necessary—the error appears of record. 122 Ark. 148; 126 *Id.* 118; 31 R. I. 432; 124 App. Div. 935; 6 C. J. 717, 712, § 264, etc.

*Martin, Wootton & Martin*, for appellee.

The proceeding is statutory. Kirby's Digest, ch. 94. No motion for new trial was filed. 122 Ark. 148; 126 *Id.* 118. No error is apparent upon the face of the record.

#### STATEMENT OF FACTS.

On the 21st of April, 1917, the appellee served notice upon the appellants that he would make application to the circuit court of Garland County on the 4th day of May, 1917, for a summary judgment against them on account of moneys collected and received by them as appellee's attorney, setting out in the notice that he claimed this sum by reason of appellants having collected \$678.04 due appellee from the Commercial Union Fire Insurance Company which appellee alleged had been retained and kept by appellants without right and after demand therefor.

On May 1st, appellee filed his motion, setting up that he had employed the appellants as his attorneys to make settlement for him of a loss due him from five fire insurance companies, among which was the Commercial Union Fire Insurance Company; that the loss was adjusted

and the insurance company named drew its draft payable to the order of the appellee in the sum of \$678.04; that appellants, without authority, endorsed the name of the appellee on the draft and collected the same; that they had wholly failed to pay the appellee, although he had made lawful demand therefor. He prayed judgment for the above sum.

Appellants filed a general demurrer to the motion, which was overruled, and appellants then answered, alleging substantially as follows: They denied that they were employed by the appellee to assist him in making settlement of a loss due him from five fire insurance companies; alleged that appellee claimed that he had sustained a loss of between \$7,500 and \$8,500 and that the insurance companies had offered in settlement the sum of \$4,400, which appellee had declined to accept; that he employed the appellants to take charge of the entire matter and bring suit for the amounts specified in the policies, and for penalty and attorney's fees; that the appellee agreed to pay the appellants the sum of \$100 as a retainer and whatever costs they incurred; that it was agreed that in case appellants did not recover more than the insurance companies had offered that the sum of \$100 should be considered as full payment for such services; that in case they recovered more and in case the court awarded appellants a reasonable attorney's fee the appellants would refund to the appellee the sum of \$100 paid by him as a retainer; that the contract was in writing; that the attorneys prepared proofs of loss and forwarded same, showing and claiming damages in the amount of \$8,500, and waited for the sixty days to elapse, expecting and believing that unless the companies in the meantime paid the full amount of the loss they would be permitted to bring suits; that appellee agreed to settle the claims with the companies for the sum of \$5,000 without the knowledge or consent of the appellants and refused to pay appellants anything until he had collected the sum of \$5,000; that he had refused to pay the costs incurred by them, amounting to \$26; that the insurance companies

did not pay the appellee the sum of \$5,000 which they had agreed to pay under the settlement made with them by the appellee, and the time having expired when the whole amount was to have been paid the appellee asked the appellants what he should do in the premises, and in response to his request they notified him of their intention to bring suits for the full amount of the policies unless appellee telegraphed within a certain time for them not to do so; that appellee did not notify them within the time not to bring the suits and they proceeded to institute the same in his name against the companies; that in order to effect the settlement which appellee claimed to have made the appellants endorsed the check set up in the motion of appellee, with two others, in the name of appellee by appellants as his attorney; that the check for \$678.04 was paid to them, but that payment was refused on the others on account of not having the personal endorsement of the appellee; that in order to give notice to the endorsees and the drawer appellants attached to the drafts the original or a certified copy of the contract between them and the appellee; that at the time the suits were instituted none of the drafts had been paid except the one for \$678.04, and at the time the suits were instituted the appellants were under the impression that the \$678.04 had not been paid, and that appellants were informed and believed that none of them had been paid; that shortly after appellants had instituted suits for an amount aggregating \$7,840 the appellee demanded that the suits be dismissed, and employed other attorneys to represent him, who made a demand upon the appellants for the payment of the sum of the \$678 held by them; that the appellants refused to dismiss the action unless the appellee would pay them a reasonable attorney's fee, in addition to the \$100, and costs they had expended, which appellee refused to do; that appellants were willing to adjust the matter of the difference between them and the appellee as to the amount of their fees, but alleged that they owed the appellee nothing if they were allowed the benefit of their contract with him.

They alleged that if the appellee had not violated his contract with the appellants and made settlement with the insurance companies without their knowledge or consent and had not deprived the appellants of the benefit of their contract to represent him in the bringing of suits against the insurance companies that such suits would have resulted, in case of a judgment in his favor for \$5,000 or more, in securing to them a reasonable fee, which they alleged to be more than the sum of \$678.00 in their hands; that the insurance companies were fully informed, both in writing and verbally, of the extent of the appellants' authority to collect the drafts, and that if they paid the draft to appellants through mistake that the money in their hands is the property of the company that paid it, and that they are responsible for the money. They further alleged that they were ready to account to the appellee in good faith for the money in their hands, and that the only controversy between them was as to what amount was due them by the appellee. They alleged that they were desirous of having the amount due them fixed in a lawful manner and offered to pay any sum found by the court, upon a final determination of the matter, to be due, and to enter into a sufficient bond to that effect. They asked that a correct and reasonable fee, under all the circumstances, be allowed them, and that the motion for a summary judgment be dismissed, and that they recover their costs, and that the appellee be permitted to resort to such remedies as he might have in ordinary methods of procedure in the courts.

The written contract made an exhibit to the answer was as follows: "It is hereby agreed by and between A. J. Patterson and the firm of Davies & Davies, attorneys, that the said attorneys are to attend to the business of securing a settlement of the claim of said Patterson for payment of five insurance policies for damages on account of fire sustained to and on account of a fire Nov. 2, 1916, by which the building and furniture of said Patterson were burned, situated on Lot 10, block 146, in Hot Springs, Arkansas, for a fee of one hundred dollars to

be paid by said Patterson whether suit is brought or not. If suit is brought and a recovery is had for an attorney's fee, it is agreed that the amount paid by the said Patterson shall be returned to said Patterson from any fee so recovered. If no fee is allowed by the court then said sum of \$100 is to be kept by said Davies and Davies, and in that event shall be considered as payment in full for such services as shall be rendered by said Davies and Davies, on account of the fact that said Patterson shall have the costs of any such suit to pay, and shall not have recovered more than the insurance companies have offered to pay."

The answer was signed and sworn to by R. G. Davies, the senior member of the law firm of appellants, and the one who conducted the negotiations with the appellee.

The court proceeded to hear testimony on behalf of the appellee and also on behalf of the appellants, which testimony is preserved and brought into this record by bill of exceptions.

The court, after hearing the testimony, rendered judgment in favor of the appellees for the sum of \$560.04, with interest, the same being the amount claimed in the motion for summary judgment less the sum of \$100 which the court found to be due the appellants as their fee for legal services and the sum of \$18 due them on account of costs which they had paid out for the use and benefit of the appellee. There was no motion for a new trial. The appellant prayed for and was granted an appeal in the lower court and has prosecuted his appeal to this court.

WOOD, J., (after stating the facts). It is insisted by counsel for appellee that inasmuch as no motion for a new trial was filed that no issues of fact will be inquired into by this court, and further insisted that there are no errors appearing upon the face of the record and that therefore the judgment should be affirmed.

(1) The statute authorizing a client to proceed in a summary way on motion before the circuit court to procure judgment against his attorney for money which



the attorney has received for him, was not intended as a substitute for the ordinary action for money had and received. Kirby's Digest, Secs. 449, 4480.

The proceedings against an attorney under these statutes are not in the nature of a common law action or an ordinary civil action under our code of procedure, but they are special statutory proceedings and are penal in character and must therefore be strictly construed. *Milor v. Farrelly*, 25 Ark. 353; *Cooley v. Lovewell*, 95 Ark. 567.

(2) The statutes were intended to cover those cases only where the attorney has received or collected money for his client and makes no *bona fide* defense either in a written answer, duly verified, or by proof, in the absence of written pleadings, showing that the money is held by him upon a *bona fide* claim that he is entitled to the same for his fee, or that he is entitled to hold the same in payment or as a lien for legal services rendered his client, or some other claim of set-off.

(3) The statute provides that the motion shall be heard and determined without written pleadings and judgment given according to law and rules of equity. Kirby's Digest, § 4480 *et seq.* But this does not mean that written pleadings may not be filed, and the court can not proceed to hear the matter simply upon the notice given upon oral motion for a summary judgment if the attorney appears and files an answer, duly verified, which shows upon its face that he has a meritorious ground of defense. This is true for the reason that the statute authorizing the summary judgment authorizes the court, upon entering a summary judgment, to further deal with the attorney as the court may deem just under the provisions of the act. The statute seems to contemplate that if the attorney, upon notice, confesses the facts set up in the motion and makes no *bona fide* defense thereto or denial thereof that the court, on rendering a summary judgment, may treat such facts as the basis of formal charges for suspending an attorney from the practice and may order proceedings to be instituted

against him for that purpose. But if such proceedings to disbar were instituted the attorney could defend against them and set up any *bona fide* defense that he might have and demand a jury trial on the issues of fact raised by him. See *Wernimont v. State ex rel. Little Rock Bar Association*, 101 Ark. 210; *Nichols v. Little*, 112 Ark. 213.

In *Nichols v. Little, supra*, we said: "The practice in such cases is defined in the case of *Wernimont v. State ex rel. Little Rock Bar Association*, 101 Ark. 210, where it was said: 'The proceedings for the disbarment of attorneys are not formal. The prosecution thereof may be conducted in the name of the State by its prosecuting officer, or the court may require a member of the bar to present and prosecute the charges. After due and proper notice has been given to the defendant of the charges preferred against him, the court has the power to proceed with the trial of the matter according to the rules of practice adopted by it, not contrary to any procedure prescribed by statute.' In that case it was held that the attorney was entitled to a trial by a jury, although the judgment in that case was affirmed, notwithstanding a trial by jury had been refused; but this was so because the court found that under the undisputed evidence in the case a verdict should have there been directed, even though the trial had been before a jury. But in the present case the evidence is not undisputed, and appellant would be entitled to a trial by jury. He cannot be said to have waived his right because he was not entitled to demand a jury upon the hearing of the motion for the summary judgment."

In *Nichols v. Little, supra*, we affirmed the judgment rendered by the court on the motion for summary judgment notwithstanding the attorney filed a response thereto which presented an issue of fact that entitled him to a trial by jury, but in that case no objection was urged to the jurisdiction of the court to render summary judgment. The parties submitted to the court's jurisdiction and proceeded to a trial of the issue of fact on the motion

for a summary judgment and the response thereto and the evidence adduced on that issue, and on appeal no objection was raised to the jurisdiction of the court to hear the cause and to render a judgment on the motion for summary judgment and the response thereto. Our attention was not called to this feature. We did not discuss or decide the question as to whether or not the court has jurisdiction to render summary judgment on a motion under the statute in a case where the attorney sets up in his answer, duly verified, facts which, if true, would constitute a complete defense to the cause of action set up in the motion. In other words, the question we now have under consideration was not raised by the parties in that case. The attorney in that case, as before stated, did not question the jurisdiction of the court to render judgment on the motion and answer, but only challenged the jurisdiction of the court to suspend him from the practice of law without proceeding according to the requirements of the statute in such cases which entitled him to a trial by a jury on the issue as to disbarment.

Now, in *Wernimont v. State ex rel. Little Rock Bar Association, supra*, it is held that an attorney is entitled to a trial by jury on the issue of disbarment where the court, in rendering the summary judgment under the statute, orders disbarment proceedings to be instituted against him. The statute authorizing summary judgments on motion of the client against his attorney also prescribes that when the court shall render summary judgment against the attorney for the amount of money received by him that the attorney shall be further dealt with as the court may deem just, etc. And in *Nichols v. Little, supra*, it was held that an attorney was not entitled to demand a jury upon the hearing of a motion for a summary judgment.

It follows as a necessary corollary to these holdings that the court has no jurisdiction to render a summary judgment on motion against an attorney in any case where the attorney in his duly verified response to the

notice and motion, sets up issues of fact which are only proper for a jury to determine and which, if found to be true, would constitute a meritorious and perfect defense to the cause of action alleged in the motion.

Attorneys are not entitled to demand a trial by jury upon the hearing of motions for summary judgments for the reason that the court has no jurisdiction to entertain such motions in causes where the attorney, in his verified response, raises controverted issues of fact on the merits of such motion.

In *Windsor v. Brown*, 15 R. I. 182, the court said: "When an officer of the court withholds funds unconscionably, or to an amount clearly above any legal claim, the court, not undertaking to settle the exact sum that may be due but to enforce good faith and fair dealing, will require its officer to pay so much as is beyond dispute."

And in *Peirce v. Palmer*, 31 R. I. 432, 444, after quoting the above, the court says: "In no case does it appear that the court has exercised this jurisdiction except as to matters about which there was no reasonable dispute. \* \* \* If it is beyond reasonable question that there has been misconduct on the part of the attorney in retaining the money the court will promptly make an order for its payment. But, alike in all cases, for the client to be given this extraordinary relief it must be clear that there has been an injustice done to him. In all cases the client has relief in the ordinary tribunals for the determination of legal controversies, and when his right to have a summary order can be reasonably questioned he must be referred to these ordinary remedies, whatever be the nature of the controversy."

In 23 Cyc. p. 769, it is said: "But such a judgment can not be given where the pleadings of defendant set up a substantial and issuable defense." See also 6 Corp. Juris, Sec. 264, p. 711.

Although there is some difference of opinion among the authorities, we hold to the view above expressed, that the court has no jurisdiction to render summary judgment on motion where the verified answer of the

attorney sets up issuable facts which, if true, would constitute a good defense to the motion. The answer herein stated facts, which if true, were sufficient to constitute a defense to the motion for a summary judgment. In all such cases the court should deny the motion and treat the proceeding as an ordinary action at law and transfer the same to the proper docket and allow it to take its regular course as such proceeding.

(4) It follows that the error complained of appeared on the face of the record proper and therefore no motion for a new trial was necessary.

For the error indicated the judgment is reversed and the cause is remanded for further proceedings according to law and not inconsistent with this opinion.

McCULLOCH, C. J., (dissenting). The effect of the majority opinion in this case is to hold that in a summary proceeding against an attorney instituted by his client to require payment of money received in his professional capacity, if the attorney files a response setting up an issue of fact as a defense, the jurisdiction of the court to proceed further is defeated. In other words, that an attorney charged with wrongfully withholding money of his client, however reprehensible his conduct may be, can defeat the summary proceeding provided by statute merely by interposing a denial. I do not believe that the opinion is supported by a single authority, either among the text writers or in the decisions of other courts. This view of the statute completely nullifies the remedy which the law-makers have undertaken to give, for it is easy enough for an attorney who is so recreant to his trust as to fail or refuse to pay over money collected, to interpose a specious defense for the purpose of defeating the summary statutory remedy. The New York Court of Appeals, speaking on this subject in the case of *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, said: "The law is not guilty of the absurdity of holding that, after a client has spent years in

collecting through his attorney a lawful demand, he shall be put to spending as many more to collect it from his attorney, and, if that attorney should not pay, then try the same track again."

There is a chapter in the digest of our statute devoted to the subject of summary judgments, and it is provided therein that judgments and final orders may be obtained on motion in certain instances, including clients for the recovery against their attorneys, and the procedure in such cases is fully outlined in the statute. Kirby's Digest, Chapter XCIV. Instead of the rule stated in the majority opinion being correct, the authorities are all just to the contrary, as stated by Mr. Thornton in his treatise on Attorneys at Law (Vol. 1, p. 612), where the rule is stated as follows:

"In no case should the attorney be summarily compelled to pay over money to his client if it appears that the latter is not, *ex aequo et bono*, entitled to it. But the mere assertion of a counter-claim is not such a dispute as will, of itself, oust the jurisdiction, because the court has the power to adjust any set-off which the attorney may have on account of fees or other charges due to him in connection with the proceeding in which he received the money in question, or as the result of any services for which he has a lien on money of his client coming into his hands. The good faith of the attorney in making such counter-claim is immaterial."

On page 619 of the same volume the author said: "The fact that the proceeding is a summary one does not deprive the attorney of any defense which he might have asserted in an action at law, or in a suit in equity, instituted for the same end. Thus he may set up that the money retained by him was honestly due as compensation for his services, \* \* \* or that he has a valid set-off there against." See also *Union Bldg. & Sav. Assn. v. Soderquist*, 115 Ia. 695; *Mundy v. Schantz*, 52 N. J. Eq. 744; *In Re Knapp*, 85 N. Y. 285.

The subject is thoroughly discussed in a recent opinion of the Appellate Division of the Supreme Court,

which was afterwards affirmed by the Court of Appeals. *Papa v. Rini*, 171 N. Y. App. Div. 796, 219 N. Y. 575.

The Supreme Court of Minnesota in a recent case of this kind said: "An attorney is an officer of the court. The court has jurisdiction of him. When he collects money, belonging to his client, to whom he is under a constant obligation of the highest fidelity, he may not keep it, and from the vantage ground of a defendant in possession compel his client to pursue the slower process of the law by ordinary suit. If the attorney has a lien, it may be summarily adjusted. If there is a contract as to fees, the court will construe it. If the attorney has a claim for fees, their amount may be determined." *Landro v. Great Northern Railway Co.*, 122 Minn. 87, 141 N. W. 1103.

I think this court has made a great mistake from the standpoint of both reason and policy in placing such a construction on a statute which was intended to have a wholesome effect, but which is, I think, completely emasculated by this decision. The statute was construed in an early decision of this court in the case of *Levy v. Lawson*, 5 Ark. 212, which was a summary proceeding against a sheriff by a plaintiff in execution for failure of the sheriff to pay over money collected by that officer, and this court held that the summary remedy under the statute was available, notwithstanding the return of the sheriff showed that he had accounted for all the money received from the proceeds of the sale. This court held that the plaintiff in execution might maintain an action for the false return, but that the defaulting officer could not shield himself behind a false return, and thus defeat the summary remedy provided by statute. It seems to me that that decision is wholly at war with the construction the court now places upon the scope and effect of this statutory remedy.

Moreover we are precluded from considering the merits of the case because there was no motion for new trial filed and overruled. A new trial is required as a prerequisite to an appeal where there has been an issue of

fact tried by the court or jury. Kirby's Digest, sec. 6215. The fact that the issue was tried in a summary proceeding does not exclude the necessity for a motion for new trial giving the trial court an opportunity to correct its own error before there can be a review in this court. But this court now holds, as I understand, that where the attorney files an answer, the jurisdiction of the court is defeated and that makes the error appear upon the face of the record so as to bring it up for review even without a motion for new trial.

I dissent from the conclusion reached by the majority.

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McCain v. STATE.

Opinion delivered February 11, 1918.

1. TRIAL—LIST OF VENIREMEN—RIGHT TO INSPECT.—In a criminal trial it is not error for the trial court to refuse to permit counsel for the defense to inspect a list of special veniremen, called for that case.
2. TRIAL—CRIMINAL PROSECUTION—REPUTATION OF ACCUSED—REMARKS OF TRIAL JUDGE.—In a criminal prosecution counsel sought to establish defendant's reputation as good, by the introduction of certain testimony; in the presence of the jury the court told counsel that he could not prove defendant's good character by witnesses that knew nothing about it, and that he had excluded such testimony from the jury; *held*, the remarks of the court were not erroneous.
3. APPEAL AND ERROR—EXCLUSION OF COMPETENT TESTIMONY.—It is not prejudicial error to exclude competent testimony, where other witnesses have testified to the same facts.
4. APPEAL AND ERROR—RULING OF COURT—REASON THEREFOR.—If the ruling of the trial court was correct for any reason, a judgment will not be reversed because the court gave a wrong reason for its ruling.
5. CRIMINAL LAW—HOMICIDE—REPUTATION OF DECEASED.—In a prosecution for homicide, counsel for defendant introduced testimony tending to prove deceased's reputation at the time of the killing, for peace and quiet, *held*, no prejudice resulted from the court's excluding testimony as to deceased's character twelve or fourteen years before the killing.



6. **EVIDENCE—CRIMINAL TRIAL—CONDUCT OF THE PARTIES.**—In a prosecution for homicide, where testimony of ill-feeling between deceased and accused at the time of the killing had been introduced, evidence that such bad feeling existed four or five years previously, is irrelevant.
7. **APPEAL AND ERROR—INSTRUCTION PARTLY INCORRECT.**—It is not error to refuse an instruction which, taken as a whole, is not correct.
8. **HOMICIDE—SUDDEN PASSION.**—Where one kills another in a sudden heat of passion, caused by a provocation apparently sufficient to make the passion to kill irresistible, the offense is manslaughter and not murder.
9. **HOMICIDE—DELIBERATE KILLING.**—Deliberate killing, without passion, whatever may have been the provocation, is murder.
10. **TRIAL—LENGTH OF ARGUMENT OF COUNSEL.**—In a prosecution for homicide, the amount of time to be allotted to counsel for argument is within the sound discretion of the trial court.
11. **TRIAL—HOMICIDE TRIAL—CONDUCT OF WIFE AND CHILDREN OF DECEASED.**—In a prosecution for homicide, while counsel for defendant was arguing the cause, following a certain remark, deceased's widow exclaimed, " \* \* \* that is a lie." The court admonished her not to interrupt. She then, with her children, proceeded to leave the court room; in the rear of the room she screamed and fell, and the children cried aloud, "Our mother is dead." *Held*, there being no evidence that this behavior was prearranged, that it would not constitute a ground for reversing a judgment pronounced upon a verdict of guilty.
12. **TRIAL—PRESERVATION OF ARGUMENTS OF COUNSEL.**—It is not error for the trial court to refuse to order the argument of counsel to be preserved stenographically. If counsel desire the arguments preserved they should make request of the stenographer to take them down before the arguments begin, or request the court to have the argument preserved.

Appeal from Nevada Circuit Court; *George R. Haynie*, Judge; affirmed.

*J. O. A. Bush*, for appellant.

1. It was an arbitrary ruling and abuse of discretion to refuse defendant the right to see the list of jurors summoned, or have a copy or time to investigate the personnel of the jury.

2. It was error to exclude the testimony of defendant's character witnesses. The evidence was competent. 1 Gr. Ev. § 461*d*, par. 2; 59 Ark. 54.

3. The court expressed an opinion as to the weight of the testimony in its remarks. 43 Ark. 289; 45 *Id.* 165, 292; 49 *Id.* 165; 53 *Id.* 381; 58 *Id.* 108; 25 S. W. 282; 43 Ark. 73.

4. The evidence as to character was not too remote. Jones on Ev. § 859; 51 Ark. 144.

5. The court erred in its instructions given and refused.

6. The court limited the argument of counsel to one hour and a half.

7. The presence and action of Mrs. Slagle and children was prejudicial.

8. The remarks of the State's attorney were highly prejudicial. 117 Ark. 551; 34 L. R. A. (N. S.) 811; 106 Ark. 370; 58 *Id.* 368.

9. The stenographer was not permitted by the court to take down the language and remarks of the Prosecuting Attorney. Kirby's Digest, § 1330.

*John D. Arbuckle*, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. There was no error in refusing to let defendant see the list of jurors. Neither side was allowed the privilege. There was no discrimination and no violation of law. Kirby's Digest, § 2348.

2. There was no error in the exclusion of testimony as to character. 130 Ark. 322. Some of the evidence was cumulative merely, other was too remote and incompetent. No prejudice is shown. Kirby's Digest, § 2605; 100 Ark. 132; 28 S. W. 152.

3. Mark McCain's testimony was inadmissible. 84 Miss. 758; 99 N. W. 179.

4. There is no error in the instructions refused. Only part of No. 8 was correct. The 10th is inaccurate and the 15th is erroneous, and not the law. Addison, 155, 162.

5. There was no error in limiting the argument. It was within the sound discretion of the court and not capricious or arbitrary. 38 Ark. 304; 100 Ala. 26; 14

Neb. 572; 90 Ill. 117; 149 Ky. 495; 21 Mo. 257; 70 N. C. 241; 55 Wash. 675; *Holt v. State*, ms. See also 88 Neb. 464; 60 Tex. Cr. 236; 148 Ky. 80; 122 Mich. 284; 136 Mo. 74; 110 Ala. 11; 42 Wash. 540.

6. The widow and children had a right to be present, and their action is no ground for reversal. 109 Ark. 138, 149.

7. The remarks of the prosecuting attorney were not prejudicial nor error. 100 Ark. 232; 91 *Id.* 576; 94 *Id.* 548; 85 *Id.* 514; 65 *Id.* 475; 95 *Id.* 172.

8. The request for the stenographer to take down the remarks of counsel was not made in due time. No prejudicial error is shown.

WOOD, J. Appellant was indicted for the crime of murder in the first degree in the killing of J. P. Slagle. He was convicted of murder in the second degree, and sentenced by the judgment of the court to imprisonment in the State penitentiary for a period of seven years. From that judgment he appeals.

The testimony for the State tended to prove that bitter feeling existed between Slagle and the McCains,—Mark, the father, and Joe and Henry, his sons; that a short time prior to the killing of Slagle he had kicked Joe McCain without provocation, which had greatly aroused the anger of the McCains; that they entered into a conspiracy to kill Slagle, and that he was killed as a result of such conspiracy. On the other hand, the testimony for the appellant tended to prove that he killed Slagle in an attempt to protect his father and brother from a murderous assault made upon them with a pistol.

(1) The grounds urged for reversal will be considered in the order presented in appellant's brief. The court had ordered the sheriff to summon a special venire of forty men from which to select a jury to try the appellant. The court directed the sheriff not to permit anyone to see the list of men summoned for the special venire. The reason given by the court for such direction to the sheriff was that at a former trial, after it was

ascertained who the jurors were a great many of them had been summoned as witnesses, and for that reason, had been disqualified to sit as jurors.

There is no provision of law requiring that a list of the names of the special venire whom the sheriff has summoned under the direction of the court shall be furnished the parties before a case is called for trial. In the absence of a statute conferring such right, there could be no prejudicial error in the refusal of the court to grant appellant that privilege. The court's direction to the sheriff, it appears, was not to permit any one to see the list of men. It was not shown that the sheriff disobeyed the orders of the court, and the direction was as fair to the appellant as to the State. The appellant was not entitled to have any particular jurors try his case and his rights were fully protected if he secured a panel, summoned under the orders of the court, who, at the time they were called to answer as to their qualifications, were found to be duly qualified.

(2) Rufus Kirk testified that he had been acquainted with appellant about seven years; had lived a close neighbor to him during that time. He had never heard anything against appellant's reputation. While on his direct examination he testified that he knew the general reputation of appellant in the community in which he lived for being a quiet law-abiding citizen and that his reputation was good, yet, on his cross-examination he stated that he supposed his reputation was all right, that he had never heard anything against it, and for that reason he thought his reputation was good. The court, over the objection of appellant, excluded the testimony.

Witness Harris testified that he knew appellant pretty well all his life; had lived within six or seven miles of him; was acquainted with his general reputation in the community as a law-abiding, quiet and peaceable young man, and that it was good. On cross-examination he stated that was what he believed about him, and what he knew from his association with him. On direct examination he testified that he had never heard anything

against him, and in answer to the direct question, "Did the people generally regard him as a good boy, do you know?" he answered, "Yes, sir." And then on redirect examination he stated it was what he knew himself. He knew that appellant was a good boy.

The court thereupon said to the jury, "You will not consider his reputation by what he knew himself; that is not proper." The witness was then excused and another witness called on behalf of the defendant, but before he proceeded to testify, the record shows the following colloquy between the court and Mr. Bush, the attorney for the appellant:

"The Court: Now, Mr. Bush, I don't want to shut you off, but I cannot sit up here all day and listen to testimony of this kind.

"Mr. Bush: If the court please, technicalities come up—if they will concede his reputation as established—

"The Court: It is not a question of technicality; I am trying to govern this case by the rules of law—

"Mr. Bush: I understand, but I don't mean any reflection on the ruling of the court—

"The Court: If you have got any witnesses who under the rules of law know the general reputation of the defendant, I want you to get them in here.

"Mr. Bush: I think they all do.

"The Court: Well, not according to the ones you have brought on the witness stand. If you have got witnesses who know the general reputation of the defendant, you are entitled to produce them and I am willing to listen to a reasonable number of them, but I don't want to sit here and listen to witnesses who don't know anything about it.

"Mr. Bush: I want to object to the statement of the court as expressing an opinion on the weight of the testimony.

"The Court: No, I don't mean to do that. I have ruled out all the testimony that is not competent here. I am referring to the testimony that I have held not com-

petent to go to the jury and I am not expressing an opinion on the weight of the testimony.”

Counsel for appellant contends that the effect of the court's remarks, as above set forth, in the presence of the jury, was to tell them that no competent evidence of appellant's good character had been produced. The concluding remarks of the presiding judge show clearly that he was not expressing an opinion upon the weight of the testimony of those witnesses that he had held to be competent. This testimony he had allowed to go to the jury, but the testimony of the witnesses that he considered incompetent he had excluded, and his remarks referred to that testimony.

It can not be fairly inferred, when the colloquy between the court and counsel is taken as a whole, that the court meant to say to the counsel, in the presence of the jury, that he had produced no evidence of the good character of the appellant. On the contrary, the effect of the court's remarks was to say, in the presence of the jury, that it was not competent to prove the good character of appellant for peace and quiet by witnesses who did not know his general reputation, and that such testimony he had excluded from the jury; but that the testimony of the witnesses who were acquainted with his general reputation, and who had testified to his good character, he had permitted to go before the jury for their consideration, and that he did not mean by what he had said to express any opinion upon the weight of that evidence.

There were no prejudicial errors to appellant in the remarks of the court.

(3) So far as the testimony of the witness Harris is concerned, it does not appear that appellant reserved any exceptions to the ruling of the court in saying to the jury, “You will not consider his reputation by what he knew himself. That is not proper.”

The testimony of the witness Kirk was competent. *Cole v. State*, 59 Ark. 50. But it was not reversible error to exclude the same for the reason that a dozen other witnesses had testified to the good character of appel-

lant, and there was no attempt upon the part of the State to prove otherwise. *Striplin v. State*, 100 Ark. 132; *Brooks v. State*, 85 Ark. 376.

The testimony of Kirk was but cumulative, and it would have been within the discretion of the court to have excluded it on that ground.

(4) If the ruling of the court was correct for any reason, it will not be reversed because the court gave the wrong reason for its ruling.

The appellant offered to prove by J. M. Hicks, who had lived as a neighbor to Slagle about fourteen years before the killing, and also by T. J. Shell, who was his neighbor about twelve or thirteen years before the killing, that they knew the general reputation of Slagle in the community where he lived and that he had the reputation of being a dangerous, insulting, overbearing and boisterous man. The court refused to permit this proof.

(5) Appellant had proved by five witnesses that the character of Slagle at the time of the difficulty was that of a troublesome, quarrelsome, dangerous man; and he also proved by one witness that such was his character about two years before the killing, and by another that such was his character four or five years before the killing.

The only pertinent fact that could have thrown any light upon appellant's defense was the character of Slagle as being that of a violent and dangerous man at the very time of the killing, and since appellant proved that such was Slagle's character at the very time of the killing no possible prejudice could have resulted to appellant in the ruling of the court in excluding the testimony to the effect that such was the character of Slagle twelve or fourteen years before the killing.

(6) The court did not err in refusing to permit appellant to prove by his father that Slagle had slapped appellant's grandmother's jaws four or five years before the killing. It was abundantly established by other testimony that bad feeling existed between the appellant and Slagle at the time of the killing, and testimony that

such bad feeling had existed four or five years before, and the particular causes for such bad feelings would have introduced collateral matters, wholly irrelevant to the issue which the jury was called upon to try. *Thompson v. State*, 84 Miss. 758. The court did not err in refusing to permit appellant to prove by his father that appellant had been kept in jail for six months and was not permitted to make bail, for the reason that these were entirely irrelevant issues.

The appellant complains of the refusal of the court to grant the following prayers for instructions:

"8. The indictment in this case is a mere form or accusation, and is not any evidence whatever of the guilt of the defendant, and no juror in this case should permit himself to be, to any extent whatever, influenced against the defendant on account of the indictment, or of any preconceived opinions of the guilt or innocence of the defendant, or of any rumors that he may have heard, or of any evidence of public opinion against him, or of any feeling or sign of approval or disapproval of bystanders; but his opinion as to the facts should be made entirely from the evidence of the witnesses as given in the trial of this case."

"10. You are further instructed that the State alleges and undertakes to prove that a conspiracy existed between Mark McCain, Henry McCain and Joe McCain, to kill the deceased, and that charge is based upon circumstantial evidence. You are therefore instructed that before you can find that the defendant is guilty of entering into a conspiracy to take the life of the deceased, you must not only find that evidence in the case is consistent with that theory of his guilt, but you must also find that it is inconsistent with every other reasonable hypothesis than that of his guilt."

"15. You are further instructed that as a matter of law there can be no murder without malice and that murder is committed only when no considerable provocation appears. Therefore, if you find from the evidence that the conduct of the deceased was such as to offer to the



defendant a serious and considerable provocation, then you will acquit the defendant of the charge of murder.”

(7) So much of prayer No. 8 as told the jury that the indictment in the case was not any evidence whatever of the guilt of the defendant, and that the opinion of the jurors as to the facts should be made entirely from the evidence of the witnesses as given in the trial was correct; but these correct statements of the law were connected with other statements which were abstract, argumentative, and therefore calculated to confuse the jury. The court therefore did not err in refusing the prayer, even though some portions of it were correct declarations of law. It is not error to refuse an instruction which, taken as a whole, is not correct. Such portions of prayer No. 8 as were correct were fully covered by instructions which the court gave, in which the jury were told that before they would be authorized to convict the appellant they must find from the evidence in the case beyond a reasonable doubt that all of the material allegations of the indictment were true, and that at the outset of the trial the appellant was presumed to be innocent, and that this presumption shielded him from conviction unless overcome by proof beyond a reasonable doubt.

Prayer for instruction No. 10 was predicated upon the assumption that the only evidence of conspiracy in the case was circumstantial. Such assumption was not correct, for it ignored the direct testimony on the part of the State tending to prove that the McCains—Mark, the father, and Joe and Henry (appellant), his sons—were in a conspiracy to take the life of Slagle. The issue as to the conspiracy, under the evidence, was fully and correctly stated in appellant’s prayer for instruction No. 9,\* which the court granted.

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\*“It is charged by the State that a conspiracy existed between the defendant and his father and brother to kill the deceased. You are instructed that before you can convict the defendant of being guilty of conspiracy to kill the deceased, that fact must be proved to your satisfaction, beyond a reasonable doubt. And if you should find that Mark McCain and Joe McCain entered into a conspiracy to kill the deceased, still that fact would not justify you in finding the defendant guilty, unless you find, beyond a reasonable doubt, that he, the defendant, entered into such conspiracy.” (Reporter.)

The court did not err in refusing appellant's prayer for instruction No. 15. It was inherently erroneous.

(8) Where one kills another in a sudden heat of passion, caused by a provocation apparently sufficient to make the passion to kill irresistible, the offense is manslaughter and not murder, because, under such circumstances, the existence of malice aforethought is excluded; for even though there might be a serious and considerable provocation, this might not be sufficient to reduce the grade of the homicide from murder to manslaughter. Such a provocation might not be apparently sufficient to arouse the passions and to make the same irresistible. Besides, even if there were a serious and considerable provocation, and one apparently sufficient to arouse an irresistible passion to kill, such provocation would have to exist at the very time of the killing or so shortly before that it could not be said that there had been cooling time, or time for the passion to have subsided.

(9) "Deliberate killing, without passion, whatever may have been the provocation, is murder. For, if the killer was cool and master of his passion, and in the full exercise of his judgment, the principle of responsibility thus remaining, he must suffer the full effect of his conduct." *Pennsylvania v. Bell* (Pa.), Addison 156, 162.

(10) The court limited the argument to an hour and a half to each party. There were three attorneys representing the appellant, and they divided the time between them, the first two taking twenty minutes each and the last fifty minutes. The appellant contends that, inasmuch as there were seventy-seven witnesses and twenty-six declarations of law, and considering the volume of testimony and intricate questions involved, there was not sufficient time for his counsel to properly present his case to the jury.

In *Green v. State*, 38 Ark. 304, 319, this court, speaking through ENGLISH, C. J., said: "The order of argument, when a number of counsel are engaged, the subjects, length and range of their discourses to the jury, must necessarily be left to the sound discretion of the presiding

judge; and unless the bill of exceptions shows, as it does not in this case, that such discretion was abused in making, or refusing to make, rulings in relation to the argument, it is not the subject of review here." See also other cases cited in the Attorney General's brief.

Although the instructions were numerous and the testimony was voluminous, the trial court doubtless concluded that the salient and essential features of the evidence and the law applicable thereto could be fully presented without any prejudice to appellant's rights within the time allotted. And although it occurs to us, from an examination of the record, that the time was rather short to present a cause of such magnitude, nevertheless we are not convinced that the trial court, in so allotting the time, acted in a capricious or arbitrary manner, and therefore we can not say that the court abused its discretion, and that the appellant was prejudiced by the court's ruling.

(11) The record shows that, "During the trial Mr. Bush, one of the attorneys for the defendant, while making the closing argument for the defendant, said, 'Mrs. Slagle does not deny that she told Mrs. Perry Smith on the day of the killing that Mr. Slagle and Perry Smith had fixed it all up the day before, and Slagle had brought it on himself and she did not want the McCains punished,' when Mrs. Slagle arose and said, 'If the court please, that is a lie.' The court admonished Mrs. Slagle not to interrupt Mr. Bush. She and her children then started out of the court room, and on reaching the rear of the court room she screamed and fell, and her children were very much excited and cried aloud, 'Our mother is dead.' "

"The widow and children had the right to be present during the argument of counsel, and the case will not be reversed because they shed tears." *Timer v. State*, 109 Ark. 138, 149.

There is nothing to indicate that this spectacle was a stage-setting, prearranged by those interested in the prosecution for the purpose of bringing to bear an undue influence upon the jury. It was nothing more nor less

than a sudden outburst of emotion upon the part of the widow and children of Slagle, whose nerves had been so wrought upon and strained by the tragic and irreparable loss to them of husband and father, and the events connected with the trial of his slayer, that they doubtless were wholly incapable, for the moment, of repressing their emotions. The nature of the occurrence was such that it is manifest that the court could not have anticipated it, and the ruling of the court, admonishing Mrs. Slagle to desist, it occurs to us, was sufficient, under the circumstances, to indicate to the jury that such conduct on her part was improper. Appellant and his counsel seemed satisfied at the time that it was not necessary for the court to make any further or additional ruling in the premises, for they did not ask for such ruling.

It is not at all likely that the jurors, as sensible men, anchored by their oaths to the law and the evidence, would have been swept from their moorings by this storm of hysteria from the relatives of the deceased.

We have examined the remarks of the prosecuting attorney in his closing argument, as set forth in the brief of counsel for appellant. It could serve no useful purpose to encumber the record by setting them forth in detail, since we have concluded after a careful analysis of them, that they were no more nor less than mere expressions of opinion by the attorney uttering them as to the character of the crime committed by appellant, and caustic denunciations of such crime from the prosecutor's viewpoint of the evidence adduced and the law as given by the court. We are not convinced that the remarks transcend the bounds of legitimate argument and there was no reversible error therefore in the ruling of the court in refusing to admonish the jury not to consider them.

The bill of exceptions recites that there were other statements made by the prosecuting attorney which were objected to by the defendant, but the language could not be preserved because the presiding judge would not permit the official stenographer to make a note of it.

(12) The ruling of the court presents no reversible error. The statute defining the duty of the official stenographer is in part as follows:

“\* \* \* And he shall, when so requested by either party, make a stenographic report of all oral proceedings had in such court, including the testimony of witnesses with the questions to them, *verbatim*, the oral instructions of the court and any further proceedings or matter, when directed by the presiding judge or upon the request of counsel so to do,” etc. Kirby’s Digest, § 1330.

The stenographer was not directed by the presiding judge to make a report of the arguments of counsel as they were being made, nor was there any request of counsel to have the arguments reported before the arguments began. There was no error in the ruling of the court refusing to direct the stenographer to take down the remarks of the prosecuting attorney, at that stage of the proceedings. If counsel desire the arguments preserved they should make request of the stenographer to take them down before the arguments begin, or request the court to have the arguments preserved. There is no error in refusing to require the stenographer to report the version of appellant’s counsel of what the prosecuting attorney had said in argument. Manifestly such interruptions as here insisted upon would greatly disturb the orderly progress of the trial, and can not be tolerated; such procedure was not contemplated by the statute. The appellant has not preserved by bill of exceptions the other statements of the prosecuting attorney which he says were objectionable.

There is no reversible error in the record. The judgment is therefore affirmed.

## BUXTON v. CITY OF NASHVILLE.

Opinion delivered February 11, 1918.

1. **LOCAL IMPROVEMENT — ORGANIZATION — OBJECTIONS.**—Under Act 125, Acts of 1913, where it is sought to establish a local improvement district, the finding of the city counsel that the signers of the petition constitute a majority in value is conclusive, unless within thirty days thereafter suit is brought to review the action of the council, in the chancery court of the county in which such city or town lies.
2. **LOCAL IMPROVEMENT—ORGANIZATION—ATTACK UPON—ISSUE NOT RAISED BELOW.**—In an attack upon the validity of the organization of an improvement district, the issue that the ordinance was passed by the city council on Sunday can not be raised for the first time on appeal.
3. **JUDICIAL NOTICE—DAYS OF THE WEEK—ACT DONE ON SUNDAY—ISSUE RAISED, HOW.**—While courts will take judicial notice of the days of the week, when the issue is raised as to whether a particular date was on Sunday or some other day, yet to call for a decision of the court to this effect the direct issue should be first raised by the pleadings and proof.
4. **LOCAL IMPROVEMENT—ORGANIZATION—BOUNDARIES.**—In an attack upon the validity of the organization of a local improvement district it was claimed that the district included land outside the corporate limits of the city. In support of this contention, proof of the petition filed for the formation and organization of the town was made. *Held*, in the absence of a showing that the petition was granted, the finding of the chancellor that the district in issue did not extend beyond the city limits, would not be disturbed on appeal.
5. **LOCAL IMPROVEMENT—COST OF CONSTRUCTION.**—In an attack upon the organization of a local improvement district, it was sought to be shown that the cost of the improvement would exceed forty per cent. of the value of the property in the district, by the testimony of a witness, who stated that the price of construction material had greatly advanced. *Held*, the attack would fail, where it appeared that the witness had not seen the plans nor the estimated cost of the improvement as furnished by the commissioners.
6. **LOCAL IMPROVEMENT—COST—POWER OF COMMISSIONERS.**—It will be presumed that the board of commissioners of an improvement district will not enter into a contract for the making of an improvement, the cost of which will exceed the statutory limit. The board has full authority to change the original plan and to reform the same, or to make new plans so that the cost of the improvement contemplated will not exceed the statutory limit.

Appeal from Howard Chancery Court; *James D. Shaver*, Chancellor; affirmed.

*W. C. Rodgers*, for appellants.

1. No petition as required by law was ever presented. A majority of land owners did not sign. The cost exceeded the limit. The limits extended beyond the city and embraced territory disconnected with the city. It was not necessary to bring this suit within the thirty days. *Pope v. Nashville*, ms., is not conclusive of this case. Appellants were not parties to that suit. 34 Ark. 291, 302; 35 *Id.* 62, 67; *Ib.* 450; 36 *Id.* 196. *Res judicata* can not be invoked. 66 Ark. 336; 96 *Id.* 87.

2. Petitioners may withdraw their names from a petition. 40 Ark. 290; 70 *Id.* 175; 77 *Id.* 122; 70 *Id.* 175. See also 105 Ark. 77; 121 *Id.* 276; 110 *Id.* 402.

3. A petition was filed within the thirty days allowed by the act. But the council was not in session until November 19, 1916, etc.

*W. P. Feazel*, for appellees.

1. The complaint was not filed within the thirty days allowed by law. Kirby & Castle's Digest, § 6826; *Jacobs v. City of Paris*, 131 Ark. 28; *Pope v. City of Nashville*, 131 Ark. 429. The thirty days statute was pleaded and is conclusive.

2. Argues the other questions raised.

#### STATEMENT OF FACTS.

This is a suit by the appellants against the appellees to enjoin proceedings under certain ordinances establishing improvement districts in the city of Nashville.

The petition for injunction sets up, among other things, that no petition as required by law had ever been presented to the council of the city of Nashville to lay off the land mentioned in the ordinances; that a majority of the owners had not petitioned the city council praying for such improvements to be undertaken; that the improvements contemplated in the districts would cost the property owners more than two-fifths of the assessed value of all the real property in the districts; that before any pe-

tion of any kind had been presented to the city council, purporting to contain the names of a majority in value of the owners of real property in the territory, owners in the territory affected who had signed the petitions asked that their names be withdrawn and that the enterprise contemplated be abandoned; that without such signatures there would not be a majority in value of the owners of real property in the district; that the council ignored the request of the petitioners; that the districts as set out in the ordinances extended beyond the bounds of the limits of the incorporated city of Nashville and embraced territory outside of and entirely disconnected from the city of Nashville; that since the petitions were filed and acted upon the conditions brought about by the war have made it impossible for the improvements to be made except at a cost exceeding 40 per cent. of the value of the real property in the districts.

The defendants answered, denying the allegations of the complaint, and, among other things, set up affirmatively, "that the city council of said city of Nashville, Arkansas, on the 19th day of November, 1916, at a meeting in which all the aldermen were present, proceeded to hear the petition and then and there found that the total value of the real estate situated in each of said improvement districts, the boundaries of which are identical, as shown by the last county assessment on file in the county clerk's office of Howard County, Arkansas, was \$361,553, and that the real property owned by the signers of each of said petitions, situated in said district, was more than \$191,000, and that each of the petitions for the improvements in said district has a majority in value as shown by the last county assessment, all of which will appear by a copy of said proceedings had before said council on the said 19th day of November, 1916, in reference to said petition, hereto attached, marked exhibit A and B and made a part of this answer, and that the plaintiffs or no one else by suit or otherwise in the Howard Chancery Court attempted to have the findings and proceedings of said council in regard to its said findings re-



viewed within thirty days after said findings were had, as provided by section 6826, Kirby & Castle's Digest, and the plaintiff is now for that reason barred and precluded from calling in question the findings of said council on said petition to the effect that the signers thereof constitute a majority in value of the real property situated within said district, and they here plead the thirty days limitation as a bar to plaintiff's right to maintain this suit or to call in question the correctness of the council's finding that petitions did contain a majority of the real property situated in said districts."

After hearing the testimony, the court found that "the action and finding of said council in regard to said petitions is conclusive unless suit is brought to review the action of said council within thirty days after said finding, and that in this case no such suit was brought, and that the plaintiffs are now barred by statute of limitations," and dismissed the action.

WOOD, J., (after stating the facts). (1) The finding and judgment of the court were correct. The districts which were challenged by the proceedings instituted in the chancery court were formed under act 125 of the Acts of 1913, approved March 3, 1913. The first section of that act, among other things, contains a provision that, "the owners of real property within such district shall be heard before the council which shall determine whether the signers of said petition constitute a majority in value, and the finding of the council shall be conclusive unless within thirty days thereafter suit is brought to review its action in the chancery court of the county where such city or town lies."

This suit was instituted in the chancery court of Howard County June 4, 1917, and the complaint, on its face, shows that the districts whose validity are called in question were created by ordinance passed "some time in the year 1916." It thus appears that more than thirty days had elapsed after the ordinances establishing the districts were passed before this suit was instituted.

This court, in the recent cases of *Jacobs et al. v. City of Paris*, 131 Ark. 28, and *Pope v. City of Nashville*, 131 Ark. 429, decided that the above statute was a valid exercise of legislative power and that after the expiration of the time prescribed the finding of the council that the petition was signed by a majority in value of the owners of the real property in the district could not be questioned. This disposes of appellant's contention that the majority in value of the owners of real property in the territory embraced in the improvement district had not signed the petitions designating the improvement to be undertaken.

(2) The appellant contends that the ordinances establishing the districts were passed on Sunday. The issue that the ordinance was passed by the city council on Sunday was not raised in the court below and can not be raised here for the first time. *Martin v. McDiarmid*, 55 Ark. 213; *Southern Ins. Co. v. Hastings*, 64 Ark. 253. See also *Newton v. Russian*, 74 Ark. 88; *White v. Moffett*, 108 Ark. 490.

Counsel for appellant contends that inasmuch as their complaints did not allege that the action of the council was not taken on Sunday, and inasmuch as the answer of the appellee and the proof introduced by them show that the ordinance was passed on November 19, the same being Sunday, that, in this manner, the issue was raised. Now the city council had jurisdiction to pass the ordinance, and if the appellants intended to challenge the validity of the ordinance on the ground that it was passed on Sunday they should have expressly set up that ground in their complaint, or specifically directed the attention of the court to that fact when the testimony was introduced showing that the ordinance was passed on the 19th of November.

The allegations of the appellee's answer that the council on the 19th of November, 1916, "proceeded to hear the petition" *et cetera*, was an averment by way of a recital in their plea of limitations and likewise the testimony of the city recorder to the effect that the records of the city council show that the council on the 19th of November

passed the ordinance was merely a recital of what the records in his office showed. But all this was not sufficient to raise the affirmative issue before the trial court that the ordinance was void because passed on Sunday.

(3) While courts will take judicial notice of the days of the week when the issue is raised as to whether a particular date was on Sunday or some other day, yet to call for a decision of the court to this effect the direct issue should be first raised by the pleadings and the proof. Unless the issue is thus expressly raised and the proof directed towards that issue the court would not have an opportunity to pass upon it.

If appellant had challenged the ordinance on the ground that the same was void because passed on Sunday then the appellees would have been called upon to deny or to confess that such was the case. If the allegations had been denied, proof could have been taken, directed specifically to this issue.

Such was not the case in the court below, and the date mentioned in the appellee's answer and also in the testimony of the recorder was, as already stated, by way of recital merely, and for aught that appears to the contrary, may have been so put down through the misprision of the recorder, or the draftsman of appellee's answer and plea of limitations. To permit appellants to remain silent, in the court below, on the issue as to whether the date mentioned was Sunday and to invoke here the doctrine that the court will take judicial cognizance of the fact that such date was on Sunday, would be tantamount to firing upon the holdings of the trial court from a battery that was kept masked in the court below. This can not be done. *Keller v. Whittington*, 106 Ark. 525, and cases cited.

(4) Appellants contend that the undisputed evidence shows that the district in question extended beyond the city limits of the city of Nashville. To sustain this contention they rely upon the testimony of the clerk of the county court of Howard County to the effect that he had in his possession the petition which had been filed for

the formation and organization of the town of Nashville in the year 1883 and the territory described in the petition and incorporated into the town was as follows (describing the territory). Witness then stated that in 1906 and also in 1909, petitions were filed for the annexation of certain territory, described therein, to the town of Nashville.

After describing the territory set forth in these petitions, the witness stated that a map of the territory was filed as a part of the petition. But witness nowhere testified that the county court granted these petitions nor is there any order or judgment of the court adduced in evidence showing that the petitions were granted. The appellants, therefore, do not show that any territory was included in the districts which lies outside of the corporate limits.

(5-6) Another contention made by appellants is that the uncontradicted evidence shows that the improvements contemplated will cost more than 40 per cent. of the value of the real property in the district, thereby exceeding the limit prescribed by law. To sustain this contention appellant relies upon the testimony of a witness who states that he had been in the oil business for the last two or three years, and was familiar to some extent with the market value of tiling, piping and like material, and that material of this kind was very much higher than in June, 1916; that labor was also much higher; that a plant for waterworks and sewer system costing \$90,000 in June, 1916, would cost as much again at the present time; that a conservative estimate of the cost now would be \$150,000. In *Kirst v. Improvement District No. 120*, 86 Ark. 1, we said: "Whether the improvement can be made within this limit (20 per cent. of the assessed value) can and must be ascertained at the outset. After the consent of a majority in value of the property holders has been obtained and evidenced as required by law, the first step to be taken is the appointment of a board of improvement which shall immediately form plans for the improvement and procure estimates of the cost. The cost being ascer-

tained, its comparison with the value of the real property in the district as shown by the last county assessment, will disclose whether it exceeds 20 per centum of that value, and, if it does, the improvement should not be undertaken, unless the plans can be so changed as to reduce the cost within the statutory limit."

The presumption is that the board of commissioners of the improvement district will not enter into a contract for the making of an improvement, the cost of which will exceed the statutory limit. The board has full authority to change the original plan and to reform the same or make new plans so that the cost of the improvement contemplated will not exceed the statutory limit. Now the testimony upon which the appellant relies does not show that the witness had ever seen the plans of the two districts or the estimated costs of the improvements as furnished by the board of commissioners. The above testimony is not sufficient to overcome the presumption that the board will do its duty, obey the statute, and hold the cost of the improvement within the statutory limit.

Appellants have not shown any sufficient ground for invalidating the improvement districts in controversy and the decree of the chancery court dismissing their complaint is therefore correct and is affirmed.

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CRAWFORD v. STATE.

Opinion delivered February 25, 1918.

1. **RAPE—ASSAULT WITH INTENT.**—The evidence *held* sufficient to make out the crime of rape as alleged in the indictment, but that a verdict finding the defendant guilty of assault with intent to rape was not inconsistent with the proof.
2. **JUROR QUALIFICATION—PREVIOUS OPINION.**—In a criminal prosecution, *held*, that a venireman was not disqualified by reason of having previously formed an opinion as to the guilt or innocence of the accused.
3. **WITNESSES—CROSS-EXAMINATION—RULE.**—In a criminal trial, the cross-examining party is bound by the answer of a witness concerning collateral matters, and evidence of specific acts of misconduct or immorality is not admissible in a criminal case to es-

tablish bad reputation on the part of the defendant who has testified as a witness.

4. **APPEAL AND ERROR—EVIDENCE—INADMISSIBLE TESTIMONY—INVITED ERROR.**—A party can not introduce inadmissible testimony, thus inviting and causing an erroneous ruling of the court, and then complain that his adversary is permitted to do the same thing.
5. **EVIDENCE—CRIMINAL TRIAL—CROSS-EXAMINATION.**—In a prosecution for rape, it is proper for the trial court to refuse to permit defendant's counsel to interrogate the assaulted girl concerning an act said to have been committed by the girl's sister.
6. **TRIAL—PROSECUTION FOR RAPE—CROSS-EXAMINATION OF PROSECUTRIX—REMARKS OF TRIAL JUDGE.**—In a prosecution for rape, remarks of the trial judge in stopping the cross-examination of the prosecutrix, a child of twelve years, *held*, not prejudicial.
7. **RAPE—FORCE—DUTY TO MAKE OUTCRY.**—In a prosecution for rape the question for the jury to determine is whether the assault was with force, and not merely whether outcry was made, or whether there was reasonable cause for failure to make an outcry.
8. **RAPE—PHYSICAL AND MENTAL CAPACITY OF PARTY ASSAULTED.**—The question of the capacity of a female infant to consent to an act of sexual intercourse takes into account her physical as well as her mental development.

Appeal from Independence Circuit Court; *Dene H. Coleman*, Judge; affirmed.

*F. O. Butt and McCaleb & Reeder*, for appellant.

1. The juror Broadwater was disqualified and defendant's challenges were exhausted. 113 Ark. 302; 120 *Id.* 470.

2. Improper testimony was admitted as to the bad reputation of defendant and as to the commission of other crimes. 101 Ark. 147; 99 *Id.* 604; 103 *Id.* 119. See also 91 *Id.* 555; 120 *Id.* 548; 88 *Id.* 261; 1 Greenleaf on Ev., 39; 1 Wigmore on Ev., § 56. See also as to the admission of other improper testimony, 1 Hale, Pleas of the Crown, 635; 4 Enc. Ev. 446; 10 R. C. L. 962, 975.

3. The court erred in its instructions. 105 Ark. 218; 63 *Id.* 470; 77 *Id.* 37; 99 *Id.* 558; 50 *Id.* 335. See also 68 *Id.* 336; 56 *Id.* 242; 36 *Id.* 653.

4. There was misconduct of attorney for State. 87 Ark. 461; 72 *Id.* 427, 461; 63 *Id.* 174; 71 *Id.* 427; 74 *Id.* 210.

5. There was error in the remarks of the court. 51 Ark. 147; 54 *Id.* 490; 99 *Id.* 142.

6. The verdict is against the law and the evidence and the newly-discovered evidence.

*John D. Arbuckle*, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. Broadwater was a competent jurymen. 120 Ark. 470; 114 *Id.* 472; 109 *Id.* 450; 103 *Id.* 21; 101 *Id.* 443; 85 *Id.* 64; 80 *Id.* 13; 79 *Id.* 127; 66 *Id.* 53.

2. The testimony of Grace Patterson and others in rebuttal as to misconduct of defendant was competent. 103 Ark. 119; 72 *Id.* 586; 75 *Id.* 427; 87 *Id.* 17; 80 *Id.* 495; 57 Ark. Law Rep. 122. Proof of other similar sexual offenses was admissible. 78 Ark. 16; 112 Tenn. 572; 8 R. C. L. 204; 110 Ark. 318; 125 *Id.* 275; 127 *Id.* 289; 110 *Id.* 226; 58 Ark. Law Rep. 449, and many others; also 8 R. C. L. 201; 234 Mo. 200.

3. There is no error in the instructions. 50 Ark. 330; 68 *Id.* 336; 127 *Id.* 516; 91 *Id.* 224.

4. Neither the argument nor conduct of Attorney Ponder calls for a reversal. 58 Ark. Law Rep. 268.

5. There was no error in the remarks of the court. 80 Ark. 201.

5. The law and evidence fully warrant the verdict. 50 Ark. 330. See also 41 Minn. 285; 12 Iowa, 66; 50 *Id.* 189; 96 *Id.* 471.

6. The cause should not be reversed for newly-discovered evidence. 125 Ark. 209; 54 *Id.* 364; 41 *Id.* 229.

**McCULLOCH, C. J.** The defendant, **W. D. Crawford**, was tried under an indictment charging him with the crime of rape, but he was convicted of assault with intent to commit rape and appeals from that judgment.

(1) Defendant was, at the time of the commission of the offense, the superintendent of an orphans' asylum maintained by a certain fraternal society, and the female whom he is charged with having criminally assaulted was a child under his charge in the orphanage. She had attained the age of twelve years shortly before the alleged assault was committed upon her by the defendant. The assaulted child was introduced as a witness by the State

and her testimony tended to show three separate assaults upon her by the defendant, and in each that he had sexual intercourse with her against her will. The first instance alleged by her was a few days after she became twelve years of age, in March, 1917; the next time was two or three weeks later, and the last time was on July 11, 1917. The State elected to rely for conviction upon the last assault committed. The child testified that on that day she and one of her companions were going along one of the halls in the orphanage and that the defendant caught hold of her and pulled her into a room and locked the door and had sexual intercourse with her. She stated that, over her objections, he completed the act of intercourse—that she cried out in pain, but desisted on account of his insisting that she keep quiet. She testified also that she submitted to his embraces because of his authority over her as superintendent. The testimony was sufficient to make out the crime of rape as alleged in the indictment, but the verdict was not inconsistent in finding the defendant guilty of the lower charge of assault with intent to rape, for the jury might very well have found under the circumstances as related by the child that the act of intercourse did not progress sufficiently to complete the crime of rape. It is unnecessary to relate those circumstances in detail. Defendant denied that he maintained any improper relation with the child or that he ever assaulted her on that occasion or on any other occasion.

(2) The first assignment of error is in relation to the ruling of the court concerning the competency of one of the veniremen. Broadwater, the venireman in question, stated on his examination that he had formed an opinion concerning the guilt or innocence of the defendant from reading an account of the crime in a newspaper, but that he had not expressed that opinion, and he further stated that he could lay aside that opinion and try the case upon the evidence adduced in the trial. He was examined somewhat at length by counsel for the defendant and by counsel for the State, and his answers were not always clear so far as they appear in this record. For instance,



when asked at one time a direct question whether or not he could throw aside what he might have heard or read and try the case solely upon the law and evidence as given in the trial, he replied in the following words: "I think I could." Taking the whole of his examination together, however, the language used by the witness is sufficient to express a fixed willingness and ability to disregard the opinion derived from reading the newspaper and try the case upon the evidence brought forth in the trial. That being true, the juror was not disqualified by previous opinion. *Jackson v. State*, 103 Ark. 21; *Davidson v. State*, 109 Ark. 450; *McGough v. State*, 113 Ark. 301.

(3-4) The next assignment of error concerns the admission of certain testimony over the defendant's objection. The defendant testified in his own behalf and denied all charges of improper relation between himself and the child whom he is alleged to have assaulted. On cross-examination he was asked by the State's counsel whether or not he had made a practice of fondling the girls in the orphanage whenever he had an opportunity to do so. Certain of the girls were mentioned by name, and he was asked if he had not made a practice of hugging and kissing them in the halls and in the rooms whenever he had an opportunity. He answered the question in the negative, and denied that he had ever made any improper advances on any of the girls or young women in the orphanage. On rebuttal the State was permitted to introduce several of the girls, who testified to frequent acts of misconduct of defendant in his relations with them. The ages of these witnesses range from fourteen to eighteen, and all of them testified that defendant was accustomed to putting his arms around them and feeling their breasts and kissing them when he met them in the dark hallways or other private places. Two of the girls testified that he took three of them in a room on a certain occasion, and without having actual sexual intercourse with them, he was guilty of most disgusting conduct approaching the act of intercourse. The rule is that the cross-examining party is bound by the answer of a witness concerning col-

lateral matters, and that evidence of specific acts of misconduct or immorality is not admissible in a criminal case to establish bad reputation on the part of the defendant who has testified as a witness. *Ware v. State*, 91 Ark. 555; *McAlister v. State*, 99 Ark. 604; *Brock v. State*, 101 Ark. 147. Counsel for the State defend the ruling of the court on the ground that the testimony was competent for the reason that the subject-matter thereof was not collateral, but was directed to the main issue. In other words, it is contended that the State was entitled to introduce the evidence to prove the main issue in the case, and for that reason it was competent as original evidence. *Peters v. State*, 103 Ark. 119. There are certain well established exceptions to the rule against the admission of evidence of one crime in proof of another, but we do not deem it necessary to determine in the present case whether the evidence now complained of falls within any of those exceptions, for we are of the opinion that if an error was committed by the court in admitting the testimony it was invited by the defendant's own act in drawing out similar testimony from another witness. It is a clear case, we think, of invited error of which the party can not complain. The State first introduced the assaulted girl, who testified all about the assault, and also about her making complaint to her companions and the condition her undergarments were in after the assault was made. The State then introduced one of the child's companions who testified that she was with the girl when the defendant took her into the room and that shortly afterwards the girl came up to their room and told her about the assault and showed her the condition of her undergarments. She testified that they talked about the matter with some of the other girls and finally decided to go and tell one of the ladies in the orphanage about the instance, and did so. No objection was made by the defendant to any of these girls' testimony, but on cross-examination counsel for defendant drew out the fact from the witness that the defendant had assaulted her and two other girls. She testified that on one occasion the defendant took her and two

other girls into a private room (neither of them being the girl assaulted in the present case) and that he took them upon his lap one by one and took out his sexual organ and rubbed it against theirs without attempting to complete the act of intercourse. The witness stated that defendant had frequently repeated those acts of misconduct with her and the other girls whom she mentioned. The conduct of defendant with the other girls as proved by the witness introduced by the State did not differ materially from that shown by the testimony drawn out by defendant himself. In fact, the testimony drawn out by defendant from the witness, if believed, established misconduct much more gross and repulsive than that shown by the testimony of the witness introduced by the State. A party can not introduce inadmissible testimony, thus inviting and causing an erroneous ruling of the court, and then complain that his adversary is permitted to do the same thing. *Mitchell v. State*, 86 Ark. 486. The fact that the testimony objected to was introduced by the State in rebuttal made a question for the discretion of the court at the time of the admission of the evidence, and we can not say that there was an abuse of discretion, for the defendant on cross-examination was put on notice of the character of testimony to be introduced.

(5) It is next insisted that the court erred in refusing to permit defendant's counsel to interrogate the assaulted girl concerning an act said to have been committed by the girl's sister. Counsel asked the child on cross-examination if she had not herself made a practice of self-abuse, which was denied, and then counsel asked her about such conduct on the part of her younger sister. Her testimony was read to her as given in the examining trial, where she had stated definitely that her younger sister had been guilty of that misconduct, and that she had taken her sister to the wife of the superintendent and reported her. The girl denied that she had stated in her previous examination that she had reported to the wife of the superintendent an act of self-abuse on the part of her sister, but stated that she had merely told the wife of the

superintendent that her sister "had done something bad." Counsel then wanted to ask her what her sister had done which she thought "was bad," but the court stopped the examination at that point. It was not competent to show what the sister of the girl had done, and the only purpose of admitting the cross-examination at all was to test the credibility of the witness, and it was entirely sufficient to allow her to be interrogated concerning what she had stated to the wife of the superintendent, and the court was correct in not permitting counsel to interrogate her any further so as to go into collateral questions as to what the actual conduct of the girl's sister had been.

Another assignment relates to the remark of the court in stopping the further cross-examination of the same witness. The girl had testified concerning the discharge of semen by defendant upon her clothes and upon the floor in attempting the act of intercourse, and she was cross-examined very searchingly as to the appearance and color and consistency of the discharge, and after asking the child many questions on this subject counsel held up a piece of white paper and asked her if the matter was as white as that piece of paper. The court, in stopping the examination, made this remark: "I don't see the point of that. I don't think a child twelve years old ought to be called on to differentiate between shades of white." It is not at all probable that this remark was understood as a comment upon the weight of the evidence or the degree of intelligence of the witness. What the court really meant was that the evidence sought to be excluded was immaterial and that the time had come to stop further cross-examination on that subject. We do not think that any prejudice possibly resulted from the court's remark or ruling.

It is contended that the court erred in refusing to give defendant's requested instruction No. 1, which reads as follows:

"You are instructed that before the prosecuting witness, Zelpha Cooper, would be excused from making an outcry, she must have had reasonable grounds to believe

in good faith that her life or safety was affected; and unless you believe from the evidence in this case, taken in connection with all the facts and circumstances proven, that the said Zelfha Cooper had reasonable cause to believe that her life or safety was endangered, then the defendant can not be found guilty of the crime of rape."

(7) The fault of the instruction was in making the guilt or innocence of defendant turn upon the question whether or not the assaulted girl had reasonable cause to believe that her life or safety was in danger. The question for the jury to determine was whether the assault was with force, and not merely whether or not outcry was made, or whether or not there was reasonable cause for failure to make an outcry.

(8) The giving of instruction No. 9 by the court was assigned as error. The instruction told the jury in substance that if it was found that the act of alleged intercourse occurred, then in determining whether or not it was forceable and against the will of the assaulted female, or with her consent, and whether or not the resistance on her part, if any, was such as to make the defendant guilty of the crime of rape, the jury was to take into consideration "the relative ages of the prosecutrix and the defendant; the physical and mental development of the prosecutrix at the time of the alleged occurrence, the relations of the parties, \* \* \* together with all the other facts and circumstances proven in the case." The particular part of the instruction objected to was the use of the words "physical and mental development," it being contended that the physical development of a child has no relation to the question of capacity to consent to an act of sexual intercourse. The instruction follows the language used by this court in the case of *Coates v. State*, 50 Ark. 330, as follows:

"If a female be an adult, but incapable of consent to carnal intercourse, from idiocy or a drug administered to her, the act is said to be forceable and against her will. The analogy of the law extends the rule to the condition of an infant, whose tender years, or exceptional want of

mental and physical development where her age is sufficient, renders her incapable of understanding the nature of the act."

The question of the capacity of a female infant to consent to an act of sexual intercourse takes into account the physical as well as mental development of the person, for they may each have some bearing on the determination of that question. Although mental development may in some cases far outstrip the physical, yet ordinarily they progress correspondingly, and it is proper to consider the physical as well as the mental development in order to determine the capacity of a girl to understand the nature of an act of sexual intercourse. The learned judge who wrote the opinion in the Coates case, *supra*, seems to have used the word "physical development" advisedly, and we believe that he was correct in doing so.

There is another assignment concerning the refusal of the court to give instruction No. 7, requested by defendant as to the burden being on the State to prove the incapacity of the child to give consent, it being undisputed that she was a little over twelve years of age at the time, but we think the instruction as modified was all that defendant was entitled to have as an instruction to the jury on this subject. The instruction as given placed the burden on the State, but used the same language that the court had used in instruction No. 9 as above set forth, which conforms to the language of this court in the Coates case, *supra*.

There are other assignments which we do not consider of sufficient importance to discuss. There is a sharp conflict in the testimony, but it was legally sufficient to sustain the verdict establishing defendant's guilt. Such being the state of the testimony, it is our duty not to disturb the verdict. The judgment is, therefore, affirmed.

## NORTHERN CONSTRUCTION COMPANY v. JOHNSON.

Opinion delivered February 25, 1918.

1. PLEADING AND PRACTICE—ACTION FOR BREACH OF CONTRACT—FAILURE TO STATE CAUSE OF ACTION.—In an action for damages resulting from a breach of contract to do certain work, and for negligence, *held*, the complaint failed to state a cause of action.
2. PLEADING AND PRACTICE—DEMURRER—FAILURE TO FLEAD FURTHER.—It is proper to render judgment for the defendant, where he demurred to the complaint, and the plaintiff refused to plead further where the complaint failed to state a cause of action, and even though the demurrer should have been treated as a motion to make more specific.

Appeal from Clay Circuit Court, Western District;  
*R. H. Dudley*, Judge; affirmed.

*T. J. Crowder*, for appellant.

1. The court erred in sustaining the demurrer to first, third and fifth paragraphs of the complaint. 80 Ark. 228; 105 *Id.* 421; 97 *Id.* 522.

*J. L. Taylor*, for appellee.

1. The demurrer was properly sustained. The first is too general and only stated a conclusion of law. 13 Cyc. 157; 72 Ark.

3. The third alleges no cause of action. It is too general. Appellee was an independent contractor and appellant was not liable for his torts. 81 Ark. 195; 77 *Id.* 551. The fifth alleges no damage. It is also too general.

WOOD, J. The appellant instituted this action against the appellee, "alleging that on the ..... day of ....., it entered into a contract with a drainage district in White County, Arkansas, near Judsonia, to dig a ditch according to certain plans and specifications, and in a certain time set out in the contract; that it entered into a contract with the defendant, A. B. Johnson, whereby he agreed to clear and prepare said right-of-way, and cut cord wood thereon within a time sufficient to enable the plaintiff to comply with its contract with the said drainage district.

1. That the defendant began said work in clearing and preparing the right-of-way and continued to work for some time, but before completing said right-of-way he quit; that plaintiff urged him to begin said work, and he promised from time to time to do so; that plaintiff dug the ditch to the end of the cleared right-of-way and was compelled to stop; that defendant still promised to do said clearing, but failed to do so and thereby delayed plaintiff twenty-two shifts, by reason of which delay plaintiff suffered damages in the sum of eight hundred and eighty dollars (\$880).

3. Plaintiff further alleged that the defendant in clearing the right-of-way, threw logs and brush off of the right-of-way on to the land owned by adjacent farmers, on account of which plaintiff suffered damages in the sum of two hundred and twenty-five dollars (\$225), the amount it was compelled to pay said farmers.

5. Plaintiff further alleged that on account of the manner and time in which the right-of-way was cleared and prepared, plaintiff was compelled to account to the drainage district for the sum of eight hundred and eighty dollars (\$880).

The prayer of the complaint was for judgment, for two thousand five hundred forty-three dollars (\$2,543).

The appellee demurred to the first, third and fifth paragraphs of the complaint. The court sustained the demurrer and this appeal challenges the ruling of the court.

The first paragraph of the complaint alleges that appellee began work in clearing and preparing the right-of-way but quit before completing his contract and therefore delayed plaintiff twenty-two shifts, which delay damaged appellant in the sum of \$880. There are no allegations to show how a delay of twenty-two shifts would result in damages to appellant in the sum of \$880. The allegations are entirely too general to form the basis of a cause of action. There is nothing in this count to show what was meant by the shift; nor what the delayed shifts



cost appellant, if anything; nor the manner in which the delayed shifts caused any expense to the appellant.

The allegation that appellee delayed appellant twenty-two shifts which caused appellant to suffer damage in the sum of \$880 was but the statement of a conclusion without any specific facts upon which it could be seen that such conclusion was correct. If appellee abandoned his contract as alleged, the measure of appellant's damage would be what it would cost it to complete it in excess of the contract price. Appellant nowhere alleged what the contract price was nor that on account of the abandonment of the work by the appellee he had to expend more to complete it than he would have done had appellee completed the work and been paid the contract price.

The allegations of the first paragraph, therefore, are not sufficient to show that the failure of the appellee to complete the contract damaged the appellant in any sum. See *Plunkett v. Meredith*, 72 Ark. 3.

While the allegations of the third paragraph are to the effect that the appellee in clearing the right-of-way threw logs and brush off of the right-of-way on to the land owned by adjacent farmers, which damaged appellant in the sum of \$225, being the amount that he was compelled to pay these farmers, there was no allegation showing where, under the contract, the appellee was required to place the logs and brush as he removed or cleared the same from the right-of-way. For aught that appears to the contrary, the contract may have required the appellee as he cleared the right-of-way to deposit the logs and brush, taken therefrom, on adjacent lands belonging to the farmers.

Furthermore, the allegations of the complaint show that the appellee was an independent contractor and there are no allegations to the effect that the work to be done under the contract and the piling of the brush and logs on adjacent lands of farmers would necessarily injure the same. Unless such was the case, even though appellee negligently piled the brush and logs upon the adjacent lands of the farmers in such manner as to injure the same,

this would be a tort for which he alone would be liable. See *White River R. R. Co. v. B. & W. Tel. Co.*, 81 Ark. 195-200; *St. L., I. M. & S. Ry. Co. v. Gillihan*, 72 Ark. 553; *Martin v. Railway Co.*, 55 Ark. 510.

Likewise the allegations of the fifth count are entirely too general to state a cause of action. The statements there made are mere conclusions. The terms of the contract between appellant and appellee as to the clearing of the right-of-way are nowhere set forth, and it is impossible, therefore, to determine whether appellee had violated the contract, and, if so, whether such violation had resulted in injury and damage to the appellant.

The court was correct in sustaining the demurrer to these paragraphs to the complaint. Even if the demurrer should have been treated as a motion to make more specific it should have been sustained. Since the appellant did not ask to amend his complaint but elected to stand upon the same, the rulings of the court in sustaining the demurrer and dismissing this complaint were correct and its judgment is therefore affirmed.

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CONNER v. STATE.

Opinion delivered February 25, 1918.

1. **CRIMINAL LAW—CROSS-EXAMINATION OF DEFENDANT—FORMER CONVICTIONS.**—The defendant may be cross-examined touching former convictions for crimes, when he becomes a witness on his own behalf.
2. **TRIAL—ARGUMENT OF COUNSEL.**—While attorneys have reasonable latitude in the course of argument to the jury, it is improper for them to overstate or exaggerate the testimony or to refer to matters not in evidence. The trial court should take prompt and vigorous action to exclude all prejudicial statements, and it is reversible error to fail to do so.

Appeal from Pope Circuit Court; *A. B. Priddy*, Judge; affirmed.

*U. L. Meade*, for appellant.

1. The verdict is not supported by the evidence. Prejudicial error was committed in the cross-examination of defendant.

2. The remarks of the prosecuting attorney were unfair and prejudicial. 58 Ark. 473; 12 Cyc. 571; 73 Ark. 453; 58 *Id.* 353; 65 *Id.* 619; 70 *Id.* 305.

*John D. Arbuckle*, Attorney General, and *T. W. Campbell*, Assistant, for appellee.

1. The evidence sustains the verdict.

2. No objections were made to the questions on cross-examination. 76 Ark. 276; 84 *Id.* 487; 96 *Id.* 7; 101 *Id.* 443; 99 *Id.* 462; 103 *Id.* 70. But the testimony was competent. 128 *Id.* 565; 100 *Id.* 321.

3. There was no error in the remarks of the prosecuting attorney, nor were they prejudicial.

HUMPHREYS, J. Appellant was indicted, tried and convicted by a jury in Pope Circuit Court for the unlawful sale of liquor. He has duly prosecuted an appeal to this court from the judgment of conviction.

It is first insisted that prejudicial error was committed by permitting the following cross-examination of appellant:

“Q. Did you ever sell any before?

A. No, sir.

Q. Ever plead guilty here in the court?

A. Not for selling whiskey.

Q. Selling anything?

A. I plead guilty here in the way of a compromise for selling a ‘near-beer,’ that was sold all over the country.

Q. How many times?

A. I forgot; some two or three.

Q. Don’t you know it was six times?

A. No, sir. I will state this, that I was indicted.”

(1) The rule of evidence is well established in this State that the defendant may be cross-examined touching former convictions for crimes when he becomes a witness in his own behalf. *Werner v. State*, 44 Ark. 122; *Hol-*

*lingsworth v. State*, 53 Ark. 387; *Holder v. State*, 58 Ark. 473; *Smith v. State*, 74 Ark. 397; *Younger v. State*, 100 Ark. 321; *Turner v. State*, 128 Ark. 565. It is not contended that the evidence is insufficient to support the verdict, so we deem it unnecessary to set the evidence out *in extenso*. Only one witness testified in behalf of the State, and two, including himself, in behalf of the appellant.

Charley Payne testified for the State, in substance, that on Saturday, between the 13th and 15th of October, 1916, he bought one quart of Murray Hill whiskey from appellant in appellant's place of business about one and a half miles south of Atkins, Arkansas, and paid him \$1.75 for it; that on Friday prior thereto he bought an intoxicating mixture of Jamaica ginger and cider from him; that on the following Monday or Tuesday he bought a quart of whiskey from Jerry Shrieves in the back end of appellant's store; that at the time of the purchase he observed a large quantity of beer and whiskey bottles in the back room of the appellant's store; that Lemley was out there with him several times and that he told Lemley on one occasion that he bought whiskey from Shrieves.

Appellant testified, in substance, that he did not remember the dates Payne came to his place of business, but he was there two, three or four times in the interest of the lighting business; that Lemley was in Payne's company when he asked appellant if he knew where he could buy some whiskey; that he put Payne next to Shrieves, and told Shrieves Payne was his friend; that soon thereafter Shrieves left and returned with a bundle under his arm, and passed through the store into the shed room; that Payne followed him back and one or the other called Lemley; that Payne and Lemley left in about fifteen minutes; that he never sold Payne any whiskey and that he was not interested in the sale of any whiskey to him; that he never sold whiskey in 1916, or at any other time to anybody; that he plead guilty in the way of a compromise two or three times for selling "near-beer;" that if any bottles were in his store they were bottles he had to put coal oil and vinegar in.

J. L. Lemley testified, in substance, that he saw appellant sell Payne Jamaica ginger and cider mixed, on Friday, but was not there with him on the following Saturday; that he was there on the following Monday and saw Jerry Shrieves leave the store and come back in about three-quarters of an hour with a bundle under his arm; that Jerry Shrieves passed through the store to the shed room and Payne then called him; that when he got back to the room, Payne had a bottle of whiskey and that they all drank out of it; that on the way back to town Payne asked him Shrieves' name and informed him that he bought the whiskey from Shrieves.

(2) It is alleged that, in view of the sharp conflict in the evidence and the weakness of the State's evidence, the court erred in permitting the prosecuting attorney to overstate the evidence in his closing argument by saying: "Gentlemen of the jury, the defendant has pleaded guilty, and has been convicted already in this court for selling liquor a half a dozen times." While attorneys should have reasonable latitude in the course of argument, it is not proper for them to overstate or exaggerate the testimony or to refer to matters not in evidence. The trial court should take prompt and vigorous action to exclude all prejudicial statements. As the jury were not admonished to disregard the statement complained of, we would not hesitate to reverse the case if we thought the statement made by the prosecuting attorney was, in fact, prejudicial. We can not see, however, how any prejudice could have resulted to appellant on account of the statement. Appellant admitted that he had pleaded guilty in that court two or three times by way of compromise for selling "near-beer." This amounted to an admission that he had been convicted two or three times on pleas of guilty for a violation of the liquor law. This admission was drawn out of him on cross-examination and went to his credibility as a witness. If his credibility as a witness was affected by this admission, it was because he had violated the law, and not because he had violated it any particular number of times. We think the violation of the

liquor laws three times would as effectually discredit a witness as six violations thereof. We do not think it can be said under this evidence that there would have been an acquittal had the prosecuting attorney omitted the statement complained of from his argument, so can not say appellant was prejudiced by the statement.

No error appearing in the record, the judgment is affirmed.

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WISCONSIN & ARKANSAS LUMBER CO. v. STANDRIDGE.

Opinion delivered February 25, 1918.

1. **MASTER AND SERVANT—INJURY TO SERVANT—SAFE TOOLS AND APPLIANCES—INSTRUCTION.**—In an action for damages for personal injuries, the court charged the jury, “\* \* \* it is the duty of the master to use *reasonable* care to provide the servant with reasonably safe tools and appliances with which to perform his work, and to use reasonable care to provide the servant with a reasonably safe place in which to perform his work. \* \* \*” *Held*, the instruction was not erroneous because of the use of the word “reasonable” instead of “ordinary.”
2. **MASTER AND SERVANT—INJURY TO SERVANT—DAMAGES—DIMINISHED EARNING CAPACITY.**—In an action for damages resulting from negligence, *held*, that the jury might consider plaintiff’s diminished earning capacity, in arriving at the damages, and that the impairment of plaintiff’s eyesight alone is sufficient to warrant the inference that his earning capacity has been decreased.
3. **DAMAGES—AMOUNT—PERSONAL INJURIES.**—In a personal injury action it appeared that plaintiff endured great pain and still suffers pain in his neck and head as a result of the injury, that he partially lost his sight and is compelled to wear glasses, that as a result of the injury he can not continuously follow his trade at which he formerly earned \$2.50 per day, and that there is a slight disfigurement of his nose, which gives him a peculiar appearance. *Held*, under these facts, a verdict for \$2,000 was not excessive.

Appeal from Hot Spring Circuit Court; *W. H. Evans*, Judge; affirmed.

*T. D. Wynne*, for appellant.

1. The verdict is contrary to the law and the evidence. There was no negligence, but there was contributory negligence by appellee.

2. The court erred in its instructions. 97 Ark. 180; 129 Ark. 111; 104 *Id.* 67; 70 *Id.* 441; 76 *Id.* 468; 88 *Id.* 454; 117 *Id.* 193; 90 *Id.* 278; 97 *Id.* 358.

3. The verdict is excessive.

*Henry Means* and *Harry H. Myers*, for appellee.

1. The verdict is supported by the evidence. 67 Ark. 537; 25 *Id.* 474; 49 *Id.* 381; 51 *Id.* 467; 120 *Id.* 206.

2. There is no error in the instructions. 16 Ark. 308; 74 *Id.* 381; 75 *Id.* 261; 98 *Id.* 863; 92 *Id.* 143; 56 *Id.* 196.

3. The damages are not excessive. 1 *Suth. Dam.* 113-118; 13 *How.* 344; 60 Ark. 151; *Jones on Ev.*, § § 393-8, 401-5.

HUMPHREYS, J. Appellee instituted suit in the Hot Spring Circuit Court to recover damages for an injury received on the 31st day of May, 1916, while assisting appellant's master mechanic, or foreman, in putting a spring hanger on the side of appellant's locomotive. The negligence charged consisted in the failure of appellant to furnish proper materials and tools with which, and a safe place in which, to work.

Appellant answered, denying specifically the negligence alleged, and, by way of further defense, pleaded contributory negligence and assumed risk by appellee.

The cause was submitted to a jury upon the pleadings, evidence and instructions of the court. The jury returned a verdict in favor of appellee in the sum of \$2,000, and a judgment was rendered against appellant for that amount. An appeal has been prosecuted to this court from that judgment.

The evidence, in substance, disclosed that appellee and other employees were putting a spring hanger on the side of appellant's locomotive under the supervision and direction of Tom Garrett, its foreman or master mechanic, at the time the injury occurred, about 10 o'clock at night,

May 31, 1916. Garrett had a light in his hand and gave directions to the men. A spring puller, commonly known as a crowfoot or U-bolt, was used in connection with the iron prize pole to pull the spring down to its place. The spring puller was in the shape of a horseshoe, the heels pointing backward and down so as to form a hook in the shape of a half square. This was hooked over the spring, which allowed the loop to drop down below the spring. This particular spring puller was made for a larger locomotive than the one being repaired, and consequently the loop extended down below the bottom rail of the frame, so it became necessary to place a piece of iron in the loop below the prize pole in order to furnish the necessary leverage to pull the spring down in place. A block of iron three by four inches was placed in the loop by the foreman to serve as a fulcrum. The spring did not come to place when the men pulled down on the prize pole the first time. Just before they pulled the prize pole down the second time Mr. Wheat exclaimed, "Lookout, that's dangerous!" Mr. Garrett responded, "No, it ain't; it's all right;" and directed the men to pull down on the prize pole their very best. When they did that the fulcrum flew out and struck appellee with great force on the nose and rendered him unconscious for a time.

The evidence is conflicting as to whether appellee ever did such work before, or whether he was familiar with the dangers incident to the work; and also conflicting as to the nature and extent of the injury. There was evidence tending to show that appellee's nose and jawbone were broken, which resulted in a slight permanent disfigurement and a partial loss of eyesight. There was, on the contrary, evidence tending to show no disfigurement and little or no injury to the eyesight.

The evidence is also conflicting as to the effect the injury had on appellee's earning capacity. He returned to work in about two weeks, but, according to his evidence, had to give up blacksmithing to a large extent and do farm work instead.



Appellee suffered great pain and testified at the time of the trial that his head and neck hurt him all the time as a result of the injury.

(1) It is insisted that the court erred in giving instruction No. 1 for the reason, it is said, that it exacted of appellant the absolute duty to furnish reasonably safe tools with which, and a reasonably safe place in which, to work; when the law only exacts that a master shall exercise ordinary care to furnish reasonably safe tools with which, and a reasonably safe place in which, to work. That portion of the instruction said to constitute error is as follows:

“ \* \* \* It is the duty of the master to use *reasonable* care to provide the servant with reasonably safe tools and appliances with which to perform his work, and to use reasonable care to provide the servant with a reasonably safe place in which to perform his work. \* \* \* ” The objection is directed to the use of the word “reasonable” instead of the word “ordinary.” We think the word “ordinary” is preferable in instructions of this character, but the difference in the meaning of the two words, when used in connection with the word “care,” is so slight that it is hardly appreciable. Bouvier’s Law Dictionary (Rawle’s Third Revision), vol. 3, pp. 2426 and 2818. Appellant is in error in its contention that instruction No. 1 is erroneous under the ruling in the case of *Holmes v. Bluff City Lumber Company*, 97 Ark. 180. The language condemned in that case was as follows: “It was the duty of the defendant to furnish plaintiff a reasonably safe place to work,” and, if “plaintiff while engaged at work for defendant was not given a reasonably safe place in which to perform his work,” etc., defendant would be liable. This language did place upon the master the duty of absolutely furnishing safe tools and a safe place, while the instruction in the instant case only required appellant to exercise reasonable care in furnishing reasonably safe tools with which, and a reasonably safe place in which to work. The case cited in support of appellant’s contention is not in point.

It is next insisted that instructions Nos. 2, 3 and 5 were not predicated upon any evidence in the case, and, therefore, abstract. We have examined the evidence carefully and find sufficient evidence to warrant the giving of each instruction.

(2) It is insisted that the court erred in instructing the jury that they might consider the decrease in the earning capacity of appellee, if any, in arriving at its verdict; for the reason, it is said, that the evidence fails to show that appellee's earning capacity was, or would be, diminished in the future. There was evidence tending to show that appellee was compelled to give up in a large measure the trade of blacksmithing and that his eyesight was impaired. The impairment of one's eyesight alone is sufficient to warrant the inference that his earning capacity has been decreased.

(3) It is insisted that the verdict of \$2,000 is excessive. The evidence tends to show that appellee endured great pain and still suffers pain in his neck and head as a result of the injury; that he partially lost his sight and is compelled to wear glasses; that, as a result of the injury, he can not continuously follow his trade at which he formerly earned \$2.50 per day; that there is a slight disfigurement of the nose which gives him a peculiar appearance. We can not agree with appellant that \$2,000 is an unwarranted award under the evidence in this case.

No error appearing in the record, the judgment is affirmed.

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ANDERSON v. PIXLEY.

Opinion delivered March 4, 1918.

1. **LOCAL IMPROVEMENT—PETITION—ASSESSMENT ON FILE—MAJORITY IN VALUE.**—In ascertaining whether a petition for a local improvement in a city or town is signed by a majority in value of the owners of real property in the proposed district, the city council shall be governed by the county assessment on file, and it is concluded by that assessment.
2. **LOCAL IMPROVEMENT—ORGANIZATION—ASSESSMENT ROLL.**—The last assessment roll prior to the organization of the district is the only

criterion by which to ascertain the total valuation of real property within the boundaries of the district.

3. **LOCAL IMPROVEMENT—ORGANIZATION—MAYOR AS COMMISSIONER.**—A local improvement district, otherwise validly organized, is not rendered invalid by the appointment of the mayor of the city as a member of the board of improvement commissioners. The mayor may be at least a *de facto* member of the board, and its proceedings are valid until he is removed.

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; affirmed.

*Fred A. Snodgrass*, for appellant.

1. The mayor was disqualified to act as commissioner. Kirby & Castle's Digest, § § 6677-8-9-80, 6843.
2. The second petition did not contain a majority in value of the real property in the district. 99 Ark. 521.

*Rose, Hemingway, Cantrell, Loughborough & Miles*, for appellees.

1. The mayor was a proper member of the board. 97 Ark. 334.
2. The petition was signed by a majority in value. 99 Ark. 508; 127 *Id.* 418.

**HART, J.** This was a suit in equity brought by appellants as owners of real property within the boundaries of a proposed improvement district in the city of Argenta, now North Little Rock, Arkansas, against appellees as board of commissioners of said improvement district to declare invalid the formation of said district. The chancellor upheld the validity of the district, and the case is here on appeal.

The validity of the district is attacked on two grounds. First, that the second petition did not contain a majority in value of the real property within the boundaries of the proposed district; and, second, that the mayor of the city could not legally be appointed as one of the commissioners of the district.

The second petition came on for hearing on the 6th of August, 1917, and it was found that a majority in value of the owners of real property within the district had

signed the petition. The appellants offered to prove that a school building situated within the boundaries of the district was assessed in 1915 and 1916 for \$27,200 and in 1917 for \$125,000; that the school building in 1917 was in the same condition as it was during the years 1915 and 1916; that the amount for which it was assessed in 1917 was far in excess of its value.

It appears from the record that if the school building had been assessed in 1917 for the same amount that it was assessed for during the years 1915 and 1916, that the petition would have contained less than a majority in value of the real estate in the district. The court properly refused to consider this testimony. In the case of *Improvement District No. 1 of Clarendon v. St. Louis Southwestern Railway Co.*, 99 Ark. 508, it was held that in ascertaining whether a petition for a local improvement in a city or town is signed by a majority in value of the owners of real property in the proposed district, the city council shall be governed by such county assessment on file and that it is concluded by that assessment.

In the case of *City of Malvern v. Numm*, 127 Ark. 418, it was held that the last assessment roll prior to the organization of the district is the only criterion by which to ascertain the total valuation of real property within the boundaries of the district. In that case it was also held that school property has a voice in the organization of a district according to its value fixed by the assessment roll.

It is next insisted that the organization of the district was invalid because the mayor of the city within which the proposed district was situated was made a member of the board of commissioners.

In the case of *McDonnell v. Improvement District No. 145, Little Rock*, 97 Ark. 334, it was held that a member of the city council was not disqualified to serve as a member of an improvement district within the city. The court said that the duties of the two positions were not incompatible with each other. The Legislature of 1909 provided that the city council should have power, for cause,

to remove the members of the board of an improvement district within a city or town. *Carswell v. Hammock*, 127 Ark. 110. Our attention was not called to this statute in the case just cited. The main body of the opinion was devoted to other questions. The court only incidentally held that a member of the city council was not eligible to serve as a commissioner of an improvement district. It would have been sufficient to have held in that case that the district was not invalid for that reason. So here it may be said that the district was not rendered invalid by the appointment of the mayor as a member of the board of improvement commissioners. The acts of the board of which he was a member would be valid. Direct proceedings should have been instituted to remove the mayor from the board on account of his ineligibility to become a member because under the statute the city council had power to remove the members of the board for cause. The mayor was at least a *de facto* member of the board and its proceedings were valid until he was removed. In short, his ineligibility to serve as a member of the board would not affect the validity of the district but would only be grounds for his removal under proper proceedings.

It follows that the decree will be affirmed.

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BLASINGAME v. LOUDERMILK.

Opinion delivered March 4, 1918.

1. FORECLOSURE AND REDEMPTION—OFFICE OF EXHIBITS TO COMPLAINT—EQUITY JURISDICTION.—In an action to foreclose a mortgage, the same being a suit in equity, the exhibits control the averments of the complaint.
2. FORECLOSURE—OMISSION OF CERTAIN DESCRIPTION IN COMPLAINT AND COPY OF MORTGAGE.—In an action to foreclose a mortgage the complaint and a copy of the mortgage failed to name a tract of land described in the mortgage. The original mortgage was filed at the trial. *Held*, it was proper for the court to include this omitted description in its decree of foreclosure, and to order a sale thereof, and to confirm the sale when made.

Appeal from White Chancery Court; *John E. Martineau*, Chancellor; affirmed.

*J. N. Rachels* and *John E. Miller*, for appellant.

The land in controversy was not included in the pleadings nor exhibits. The court had no jurisdiction of it and the sale and confirmation are void as to it. 27 Cyc. 1595; 15 R. C. L. 604; 55 Ark. 562; 127 *Id.* 98; 76 *Id.* 146; 81 *Id.* 462; 19 S. E. 708.

*Brundidge & Neelly*, for appellee.

The land was in the mortgage and note. It was mere clerical mistake that it was omitted from the pleadings and record. The court properly treated the pleadings as amended to conform to the proof. 78 Ark. 350; 88 *Id.* 185; 104 *Id.* 462; 108 *Id.* 364.

SMITH, J. Appellee brought this suit as executor of the estate of D. M. Doyle to foreclose a mortgage given by D. A. Blasingame and his wife to secure the payment of the sum of money there mentioned due Doyle by Blasingame. The complaint alleged that a copy of the mortgage was filed as an exhibit to the complaint; and, while both undertook to describe the land mortgaged, neither, in fact, described the northeast quarter of the northwest quarter of section 24, township 6 north, range 10 west. An answer was filed, and a reference had to a master, to whose report exceptions were filed; but, upon a final hearing, the indebtedness was adjudged and a foreclosure of the mortgage ordered. The decree to that effect described the northeast quarter of the northwest quarter of section 24, together with the lands described in the complaint, and this forty-acre tract, together with the other lands, were sold pursuant to the terms of the decree. The special commissioner appointed to make the sale reported the sale of the lands to the executor in succession. Exceptions to the confirmation of this report were filed upon the grounds that neither the complaint nor the exhibit thereto described the above-mentioned forty-acre tract of land, and that the original precedent

for the decree as approved by the chancellor did not include it.

Upon the hearing of the exceptions the court found that the original mortgage and the note which it secured had been filed with the papers in the case upon the trial of the cause, and that after the decree of foreclosure was rendered the attorney for the defendant prepared a precedent therefor, which was submitted to the attorney for the plaintiff, who discovered that the forty-acre tract was not included. A comparison was made with the original mortgage, which was found to contain the omitted forty-acre tract, and this tract was added to the decree which had been prepared for the chancellor's approval, and, as thus amended, it was approved by the chancellor and delivered to the clerk, who entered it in the records of the court. The report of sale was duly approved, and this appeal has been prosecuted to reverse that action.

In the brief of appellant it is said: "Of course, the appellants on the hearing of the exceptions to the sale did not direct their proof to the question of how and when the land in controversy was inserted in the original mortgage, for it was then and is now their theory that, notwithstanding the decision of that question, the trial court had no jurisdiction to declare a lien upon the land and order its sale and that the sale should not have been confirmed." And the contention is made that the decree ordering the sale and the subsequent confirmation thereof is void because neither was based upon any pleading filed in the cause. Appellants testified that they did not know the forty-acre tract was involved in the suit until a short time before the sale, and that they attended the sale and objected to the offering of this tract.

In support of his position that the court had no jurisdiction to order the sale of the forty-acre tract, counsel cite and rely upon the case of *Falls v. Wright*, 55 Ark. 565. It was there said that to constitute jurisdiction three essentials must exist. First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be pres-

ent. Third, that the point decided must be, in substance and effect, within the issue. There can be no question about the jurisdiction of chancery courts in foreclosure proceedings; and no contention is made that proper parties are not before the court. Does the third essential also appear? This is a proceeding to foreclose the mortgage which described the land in controversy. Being a suit in equity, the exhibits control the averments of the complaint. *Swift v. Erwin*, 104 Ark. 459, 462, and *Goldsmith Bros. v. Moore*, 108 Ark. 362, 364, and cases there cited.

It is said, however, that the exhibit itself did not describe the land. This is true; but the omission of the above-described forty-acre tract was a mere clerical misprision. The relief prayed was the foreclosure of a particular mortgage, which correctly described the omitted land, and the action of the court, under the circumstances of the case, in amending the decree which had been prepared for entry of record was tantamount to permission given to amend the complaint or exhibit itself. A different issue would be presented if we had before us the question whether the mortgage sought to be foreclosed did, in fact, embrace the particular forty-acre tract. No such issue is involved here or was raised below. Had formal permission been asked to amend the complaint or the exhibit thereto to correct a clerical omission, the court would, no doubt, have granted that permission. It would have been proper to do so, and it would put form above substance to now hold that this should have been done before the precedent for the decree was corrected.

Decree affirmed.



INTER-STATE BUSINESS MEN'S ACCIDENT ASSOCIATION v.  
GREENE.

Opinion delivered March 4, 1918.

1. **FORFEITURES—INSURANCE POLICIES—RULE.**—Any agreement, declaration or course of action on the part of an insurance company which leads the insured honestly to believe that by conforming thereto that a forfeiture of his policy will not be incurred, followed by conformity on his part, will estop the insurance company from insisting upon the forfeiture.
2. **WAIVERS—KNOWLEDGE.**—There can be no waiver without knowledge, actual or implied.
3. **WAIVER—AMBIGUITY—INSURANCE POLICY.**—Unambiguous non-waiver clauses will be upheld by the courts; but indefinite and uncertain non-waiver clauses which might lead an insured to go to the trouble and expense of conforming to further requirements under the terms of the policy, will not be upheld by the courts.
4. **ACCIDENT INSURANCE—FORFEITURE—WAIVER.**—Appellee purchased a policy of accident insurance in appellant company, the policy providing that a professional baseball player was not insurable under the policy. Appellee was a professional baseball player and sustained an injury while playing that game. Appellee notified appellant of his injury, stating that it was sustained while participating in a professional ball game. Appellant paid appellee a portion of his claim; appellee then filled out and made oath to the final proof blanks. *Held*, appellant waived its right to insist upon the forfeiture clause forbidding appellee to engage in the professional baseball business.

Appeal from Hempstead Circuit Court; *Geo. R. Haynie*, Judge; affirmed.

*Roscoe R. Lynn*, for appellant; *Cockrill & Armistead*, of counsel.

1. Appellee was a professional baseball player and not insurable. Unless there was a waiver he can not recover. The burden was on appellee to show waiver. 67 Ark. 589; 65 *Id.* 299. No waiver was shown.

Neither sending printed blanks, the payment of \$100 nor acceptance of premium subsequent to the injury was a waiver. 67 Ark. 587; 64 *Id.* 590.

*Jobe & Vesey*, for appellee.

There was a waiver of forfeiture. 92 Ark. 378-384; 53 *Id.* 494; 99 *Id.* 476; 92 *Id.* 378; 67 *Id.* 588; 53 *Id.* 494; 79 *Id.* 475; 96 U. S. 577.

HUMPHREYS, J. Appellee brought suit against appellant in a magistrate's court in Hempstead County, Arkansas, for a balance of \$214.28, alleged to be due on an insurance policy, issued by appellant to appellee on the 14th day of March, 1916, 12 per cent. penalty and \$50 attorney's fee.

Appellant entered its appearance and judgment was rendered against it, from which an appeal was prosecuted to the circuit court.

Upon trial anew in the circuit court, evidence was heard and the following stipulation filed: "It is agreed by the parties that it is provided in the defendant association's classification of risks referred to in the policy, part D, paragraph 1, a *professional baseball player is not insurable*, and that unless there has been a waiver the plaintiff is not entitled to recover in this case." At this juncture in the proceedings, appellant requested a peremptory instruction, which was refused by the court. The court thereupon discharged the jury and rendered judgment in favor of appellee for \$214.28 debt, \$25.71 penalty and \$50 attorney's fee. From that judgment an appeal has been properly prosecuted to this court.

Appellant denied liability under the policy on the ground that the injury occurred while appellee was playing professional baseball as an occupation. Appellee admitted that he could not recover unless appellant waived its right under the professional baseball exemption clause in the policy.

The sole issue to be determined by this court on appeal is whether appellant waived its right to insist upon the forfeiture clause forbidding appellee from engaging in the professional baseball business. The undisputed facts are as follows:

Appellant is an insurance company engaged in insuring business and professional men against injury by acci-

dent. Professional baseball players are excluded by the terms of the contract. Appellee applied for a policy on February 11, 1916, and procured the policy for a term of three months on March 14, 1916, for which he paid a premium of \$2.25. He was classified in the policy as a cotton buyer. On June 7, 1916, appellee paid another premium, and the policy was renewed for a term of three months from June 14, 1916. On August 7 thereafter appellant returned a portion of the last premium to appellee and canceled the policy because appellee was then playing professional baseball. Appellee dislocated his ankle while "sliding to second base" at a time when he was engaged in playing professional baseball as an occupation. On May 3, 1916, appellee wrote appellant from his home in Hope, Arkansas, to the effect that while playing ball in Montgomery, Alabama, he happened to the misfortune of breaking his leg on April 23, 1916. This letter was received by appellant on or about May 5, 1915, and in response thereto appellant sent two preliminary notification blanks and two final proof blanks to appellee to fill out. He and his physician filled out and returned the preliminary notification blanks to appellant and they were received by appellant some time between the date of mailing and May 12 thereafter. The preliminary notification blanks, as filled out, notified appellant that the injury was received by appellee at Montgomery, Alabama, on April 23, while playing professional baseball as an occupation. On June 26 thereafter appellee wrote to appellant requesting part payment under the stipulation in the policy to pay at least half of the claim within sixty days after the date of the accident.

In response to the request, appellant wrote the following letter to appellee:

"July 18, 1916.

"Mr. J. T. Greene, Hope, Ark.:

"Dear Sir: In compliance with your recent request, I would respectfully advise that our board of directors have made an advance allowance upon your claim as per

our check No. 60036, amounting to \$100, enclosed herewith.

"This allowance is made with the understanding that by taking this action the association neither admits nor denies any additional liability on account thereof.

"Hoping that this finds you on the highway to rapid recovery, I am,

"Yours very truly,

"Inter-State Business Men's Accident Ass'n.

"E. L. Beck, Mgr. Claim Dept."

On July 27, 1916, appellee filled out and made oath to the final proof blank, which had been furnished him by the company before it knew that the injury was received while playing professional baseball, and mailed it, together with the physician's final proof of injury, to appellant. Appellant received the final proof on July 31, 1916. This proof established a total loss of time by appellee of twelve weeks on account of the injury.

**The rule concerning forfeitures in insurance policies** was considered by this court in the case of *German Insurance Co. v. Gibson*, 53 Ark. 494, and is as follows: "Forfeitures are not favored in law; and any agreement, declaration or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by conformity on his part, will estop the company from insisting upon the forfeiture." The rule thus announced has been steadily adhered to by this court. See *Germania Insurance Co. v. Bromwell*, 62 Ark. 43; *Phoenix Insurance Co. v. Flemming*, 65 Ark. 54; *American Ins. Co. v. Dannehower*, 89 Ark. 111; *Pacific Mutual Life Ins. Co. v. Carter*, 92 Ark. 378; *Queen of Arkansas Ins. Co. v. Forlines*, 94 Ark. 227; *Lord v. Des Moines, Life Ins. Co.*, 99 Ark. 476. Applying the rule to the facts in this case, it is apparent that the sending of the four blanks to appellee by appellant did not constitute a waiver, because at the time the blanks were mailed, the company had no knowledge that appellee had changed his occupation from cotton buyer to that of professional ball player.

There can be no waiver without knowledge, actual or implied. *Planters' Mutual Ins. Co. v. Loyd*, 67 Ark. 584. Nor did appellant waive its right under the forfeiture clause by accepting a premium for ninety days' renewal of the policy, because at the time it extended the policy appellee was not playing professional baseball. At the time of the extension of the policy he was convalescing and did not again engage in the profession of playing professional baseball until the latter part of August, 1916.

But the court is of opinion that the payment of \$100 by appellant to appellee on the claim, accompanied by its letter of date July 18, 1916, presented a question of waiver to be determined by a jury. If the nonwaiver paragraph in the transmittal letter had said, *this allowance is made with the understanding that by taking this action the association neither admits nor denies any liability on account thereof*, the appellee could not have misunderstood the letter. Unambiguous nonwaiver clauses will be upheld by the courts. *Phoenix Insurance Co. v. Minner*, 64 Ark. 590. But indefinite and uncertain nonwaiver clauses, which might lead an insured to go to the trouble and expense of conforming to further requirements under the terms of the policy, will not be upheld by the courts. The word *additional* in the nonwaiver clause in question may have led appellee to believe that the appellant admitted liability, but neither denied nor admitted the extent thereof. In other words, appellee may have reasonably concluded that appellant thought \$100 would be ample to pay for the injury received by appellee. So believing, the appellee would naturally go to the extent of making additional and final proofs to show the company that his injuries entitled him, under the terms of the policy, to more than \$100.

This cause was tried by the court, sitting as a jury, without objection on the part of appellant. The court found appellant had waived its right to insist upon the professional baseball exemption clause in the policy. There is sufficient evidence to support the verdict.

No error appearing in the record, the judgment is affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. WADE,  
RECEIVER OF MISSOURI & NORTH ARKANSAS  
RAILROAD COMPANY.

Opinion delivered February 11, 1918.

1. **RAILROADS—DUTY TO PROVIDE STATIONS FOR PASSENGERS AND FREIGHT—WAREHOUSES AND TRACKS.**—It is the duty of a railroad company to provide proper station house accommodations and safeguard those who may go to the stations in order to become passengers, or who may be passengers from incoming trains. This duty also extends to receiving and discharging freight; it also includes the providing of proper warehouses, switch tracks, storage tracks and sufficient station grounds for these purposes.
2. **RAILROADS—COLLISION BETWEEN TRAINS OF TWO RAILROADS—RAILWAY DEPOT COMPANY—NEGLIGENCE OF EMPLOYEES OF LATTER COMPANY.**—Four railroads entering a certain city, organized a "Union Depot Company," to care for and control the depot business and facilities of the four companies within certain defined limits, the companies entering into a contract with the Depot Company fixing the liabilities of the respective parties. A head-on collision between a motor car of plaintiff and a train of defendant occurred, resulting in the killing of over forty passengers on plaintiff's motor car, and the destruction of the said car. Plaintiff settled all the death and injury claims and sued the defendant for the amount of such payments, the value of the motor car, and interest. Both railroads were using the same track. Defendant contended that the Depot Company was responsible for the damage, because of the failure of its telegraph operator to instruct the conductor of the motor car to meet defendant's train at a certain point, he having instructed defendant's train to wait at the said point. *Held*, the Depot Company under its contract with the railroad companies, was liable only for the acts of its servants in the performance of the duties required of it within the yard limits, and in this case, *held*, the act of the telegraph operator in failing to deliver the order to plaintiff's train conductor, not having anything to do with the duties required of the Depot company, under its contract with the railroad companies, that the defendant could not rely upon the contract of the four railway companies with the Depot Company to escape liability.
3. **RAILROADS—COLLISION—NEGLIGENCE OF JOINT EMPLOYEE—INJURY TO PASSENGERS—DESTRUCTION OF PROPERTY—RAILROADS USING SAME TRACK.**—Under a contract between the parties, plaintiff railway company used a portion of track belonging to defendant railway company, the contract provided that train dispatchers,

telegraph operators and other employees of defendant company, having jurisdiction over the track mentioned, and employees about freight and passenger stations on said track, should be regarded as joint employees of both companies. The contract provided that in the event that any injury to persons or damage to property shall be caused by the negligence of a joint employee in the operations of trains over the track covered by the contract, that the loss shall be borne equally by both companies, and that each shall individually bear the damage to its own property. A collision occurred by reason of the failure of a telegraph operator employed by defendant, at a point on the line covered by the contract, to deliver an order from defendant's dispatcher to the conductor of a motor car belonging to plaintiff, instructing the conductor of the motor car to meet one of defendant's trains at a certain point on said line. In the collision plaintiff's motor car was demolished, and many passengers killed and injured. Plaintiff settled all these losses and sued the defendant for the full amount of its loss, and interest. *Held*, under the contract, that the telegraph operator was a joint employee of the two companies, that defendant company would be liable to plaintiff for one-half the personal injury losses, but would not be liable for the damage to the motor car.

4. **RAILROADS—USE OF ONE TRACK BY TWO ROADS—COLLISION—CONTRACT FIXING LIABILITY.**—The contract referred to in the two preceding head-notes, provided that plaintiff should not do any local business over the track in question unless so required by law, in which event it should assume without indemnity, full responsibility for all damage or losses to property or passengers so carried according to legal requirement. A supplemental contract should apply to local business done, whether required by law or not. *Held*, each clause in a contract must be read in the light of the others thereof, and that, defendant could not escape liability for damages sustained by local passengers, in view of the provision of the contract declaring equal liability, where the damage was the result of the negligence of a joint employee.
5. **EVIDENCE—PERSONAL INJURY ACTION—RAILWAY COLLISION—STATEMENTS OF TRAIN CREW—CONTEMPORANEOUS STATEMENTS.**—Plaintiff railway company was using a line of defendant railway companies' tracks; a collision occurred in which plaintiff's train was demolished and many passengers killed or injured. Plaintiff settled all claims, and brought an action against defendant for damages. It became an issue whether certain waiting orders were delivered to plaintiff's train crew; *held*, evidence was admissible, that when at a certain station, plaintiff's conductor received the orders, that he handed the same to his engineer, who read them, whereupon the conductor was heard to say to the

engineer that there was a clear road ahead to a point beyond which the collision occurred.

6. **RAILROADS—COLLISION—NEGLIGENCE OF TELEGRAPH OPERATOR.**—Where two railway trains, using the same track, collided head-on, the evidence held to warrant a finding by the jury that a certain telegraph operator was negligent in failing to deliver certain orders to one of the train crews.
7. **REMOVAL OF CAUSES—REMOVAL TO FEDERAL COURT—REMAND TO STATE COURT—PRACTICE.**—Where a cause was removed to the Federal Court, and was remanded to the State Court, the propriety of the remanding order will not be reviewed in the State Courts.

Appeal from Benton Circuit Court; *J. S. Maples*, Judge; modified and affirmed.

*James B. McDonough* and *Cyrus Crane*, for appellant; *S. W. Moore* and *F. H. Moore*, of counsel.

1. A verdict should have been directed for defendant because the operator, Hadley, was not the agent of the Kansas City Southern Railway Company but of the Joplin Union Depot Company, a separate and distinct entity. 186 Fed. 947; 203 *Id.* 953; 169 *Id.* 404; 162 *Id.* 556; 101 N. Y. S. 225. The operator was the sole agent of the depot company. 56 S. E. 624; 164 Fed. 785, 410; 14 How. 468; 177 Fed. 644; 114 *Id.* 100; 163 Pac. 209; 22 S. W. 570. See also 6 Mees. & W. 497; 176 Ill. 108; 98 Ill. App. 337; 28 Vt. 297; 133 Mo. App. 625; 100 *Id.* 617. The depot company was not the agent of the appellant, and Hadley was the agent of the depot company. 1 Ell. on Cont., § 549; 68 Fed. 105; 34 L. R. A. 625-7.

2. Plaintiff introduced no evidence to show the destination of the passengers injured and killed. Negligence must be proved and the burden was on plaintiff. Thompson on Negl., § 7695. See also 84 S. E. 334; 170 S. W. 591; 81 S. E. 335; 100 N. E. 942; 52 So. 406; Thompson on Negl., § 2237, and note; Elliott on Cont., § 579, 765-781, and others.

3. The conversations between Conductor Nicholas, Brakeman Bradley and Engineer Ratliff were inadmissible. They were no part of the *res gestae*. 3 Wigmore on Ev., § 1795; Chamberlain on Ev., § § 2579-2580-1. See



also 51 Ark. 509; 22 *Id.* 477; 50 *Id.* 397; 54 *Id.* 409; 58 *Id.* 52; 10 *Id.* 638; 126 *Id.* 332; 125 *Id.* 186, 217; 119 *Id.* 36; 114 *Id.* 56; 77 Ala. 374; 96 *Id.* 412; 152 Mass. 335; 14 W. Va. 277; 187 S. W. 433; 181 *Id.* 922; 176 *Id.* 896; 82 S. E. 662; 145 Pac. 743; 168 S. W. 369; 127 Pac. 166, etc.

4. The evidence establishes the fact that Conductor Nicholas signed for train order No. 84. The verdict is not supported by the evidence. 122 Ark. 445. A verdict can not be based on surmises, conjecture or suspicion. 141 N. W. 231; 42 D. C. App. 146; 106 N. E. 646; 174 S. W. 287; 174 *Id.* 547; 189 Ill. App. 316; 181 S. W. 938; 185 *Id.* 896; 235 Fed. 727; 183 S. W. 1099; 96 Atl. 967; 159 Pac. 927; 219 Fed. 686. Hearsay testimony is not satisfying. 10 Ark. 638; 122 *Id.* 445.

5. Under no circumstances is appellant liable for more than half of the damages under section 7 of article 3 of the contract.

6. The cause was properly removed to the United States District Court. High on Receivers (4 ed.), 60 a, b; 159 U. S. 36; 145 *Id.* 593; 3 Wall. 334; 109 U. S. 421; 139 *Id.* 628; 179 *Id.* 335; 173 *Id.* 113; 152 *Id.* 454; 161 *Id.* 588; 179 *Id.* 206.

7. The plaintiff, as receiver, was without authority to maintain this suit. 17 Howard 328; Simkins, Fed. Eq. St. 256; 136 U. S. 287; 99 *Id.* 235; 16 Wall. 203; 14 How. 52; 17 *Id.* 322; 149 U. S. 473; 136 *Id.* 223; 215 *Id.* 437; High on Receivers (last ed.), § 239.

8. The court erred in its instructions.

*J. V. Walker, O. L. Cravens and W. B. Smith, for appellee.*

1. Defendant owed plaintiff the duty to deliver train order No. 84; and in the discharge of that positive duty it selected Hadley, who, for the time and purpose, became defendant's agent. The trackage contract was not modified and defendant was guilty of negligence. Defendant had unlimited control over the jointly-used track. 128 Fed. 85, 91; 112 N. W. 875; 72 Fed. 455.

2. Hadley was defendant's agent. 24 Ky. Law Rep. 2388; 74 S. W. 216; 66 Atl. 553. He was performing their work. 105 Ark. 477; 111 *Id.* 497; 118 *Id.* 567; 137 N. Y. 248; 166 Mass. 268; 77 Ark. 551; 156 N. Y. 75; 123 N. W. 815; 112 *Id.* 875.

3. Even if the Joplin Union Depot operating agreement is relevant, still under its terms the operator in delivering train orders would be the agent of defendant. The finding of the jury on the question of the agency of Hadley on the instructions is conclusive. 105 Ark. 477.

4. If the collision was occasioned by the fault of the Kansas City company its liability was absolute and it is immaterial whether the destination of the passengers injured was to Neosho or beyond. (1) Objection not properly made. (2) Burden of pleading and proving exemption rested on defendant. 90 Ark. 182. A complaint need not negative matters of defense. 76 Ark. 525; 98 *Id.* 214.

Under the trackage agreement the defendant was liable for the entire loss, if the collision was occasioned by its fault. A contract should be construed as a whole and the various clauses given that construction that will make them consistent. 84 Ark. 435; 97 *Id.* 522; 104 *Id.* 475. The responsibility for the damages rested on defendant, the company at fault. 89 Fed. 560.

Contracts will not be construed to indemnify a person against his own negligence unless *such intention is expressed in unequivocal terms*. 74 S. W. 216; 77 S. E. 366; 84 *Id.* 468; 114 N. Y. S. 776; 66 Atl. 553; 172 Fed. 214; 194 Fed. 1011; 78 N. E. 1110; 29 *Id.* 151. It was not material where the passengers were destined. No word of a contract should be treated as surplusage or disregarded, if any meaning which is reasonable and consistent with the other parts can be given. 101 Ark. 22; 104 *Id.* 573. Under the contract defendant is liable for all injuries by its negligence. 76 S. E. 1087.

5. Declarations made by Nicholas and Ratliff just before motor car started are admissible. 11 Enc. of Ev. 292-6-8-9, 306, 315, 333-4, 372-3, 385; 97 Mo. 165; 10 R. C. L. 974-980; 88 Mo. 631; 57 *Id.* 93; 132 *Id.* 301; 100 Ark.

269; 48 *Id.* 333, 338; 43 *Id.* 99, 103; 66 *Id.* 500; 85 *Id.* 479; 80 Ky. 399; 54 Atl. 289; 75 U. S. 397.

6. There was a conflict of evidence upon the question of delivery by Hadley of order No. 84, and the finding of the jury is conclusive. Opinion evidence and comparison of signatures was permissible. 50 Ark. 512; 108 *Id.* 392.

7. Defendant is liable for all the damages, not merely for one-half under the contract. 74 S. W. 216; 76 S. E. 1087.

8. The remand of the case to the State court is binding and conclusive. 59 Ark. 619; 83 *Id.* 599; 137 U. S. 451; 174 *Id.* 164; 175 *Id.* 635.

8. The jurisdiction of the receiver of the Missouri & North Arkansas Railroad Company was coextensive with the State, and he was authorized to prosecute this suit. Hopkins, Judicial Code, § § 56, 81; 151 Fed. 626; 75 Ark. 365; 11 C. J. 1235-6; 107 Fed. 1; 8 So. 84; 98 Ark. 370; 150 N. Y. 828; 98 Ind. 425; 119 Fed. 391, and many others.

9. There is no error in the instructions. 58 Ark. L. Rep. 194; 88 Ark. 210.

#### STATEMENT OF FACTS.

On the 5th of August, 1914, there was a head-on collision between a motor car of the Missouri & North Arkansas Railroad Company carrying passengers and a regular passenger train of the Kansas City Southern Railway Company near Tipton Ford, in the State of Missouri. Forty-three passengers on the motor car were killed and several others were injured and the motor car was entirely demolished. The receivers of the Missouri & North Arkansas Railroad Company settled with the claimants for death losses and for personal injuries and instituted this action against the Kansas City Southern Railway Company to recover the amount so paid out by it and also for the value of its motor car. The grounds on which they sought recovery from the defendant were that the negligence of one of the defendant's employees caused the collision and that under a private contract between the

two railroad companies, the defendant was liable for the whole amount of the losses sustained.

The answer of the defendant contained a general denial of the allegations of the complaint, and averred that under the contract under which the two railroads were operating that it was only liable for a proportionate share of the losses.

The material facts are as follows: In 1907, the Missouri & North Arkansas Railroad was engaged in extending its line of road from Leslie, Arkansas, to Helena, Arkansas, on the south, and from Seligman, Missouri, to Joplin, Missouri, on the north. After it had extended its line from Seligman to Neosho, instead of building on to Joplin, it entered into an agreement with the Kansas City Southern Railway Company under the date of December 13, 1907, whereby it secured trackage arrangements over the line of road of that company between Neosho and Joplin and the joint use of the Kansas City Southern Railway Company's terminal at Neosho and Joplin. For convenience, the Missouri & North Arkansas Railroad Company will be hereinafter called the plaintiff and the Kansas City Southern Railway Company will be called the defendant.

The contract between the companies of the date of December 13, 1907, is divided into three articles.

Article 1 covers the grants and obligations of the defendant.

Article 2 contains the consideration to be paid by the plaintiff to the defendant for the trackage rights and expenses granted it.

Article 3 contains their mutual covenants and the covenants covering the mutual liabilities of the two companies.

Section 1 of article 3 provides that the plaintiff shall not do any local freight or passenger business on the line of the defendant's road between Neosho and Joplin and the intermediate towns unless required to do so by statute or some order of a railroad commission. The section also provides that in case the plaintiff is required to do

such local business it shall assume, without indemnity, full responsibility for all damage to or loss of property or death of or injury to persons carried, under such statute or order, the same as though that part of the road was owned and exclusively maintained and operated by the Arkansas company.

Section 7, of article 3 reads as follows: "Each party hereto shall for its own account assume all liability for any injury to person or damage to property that may be caused by it in the operation of its trains under this contract, whether resulting from collision or otherwise, over the road hereinbefore mentioned, and the other party shall not be liable to contribute any sum whatsoever on such account, and should such payment or contribution be made by the party not at fault, by process of law, or otherwise, the party at fault shall protect the other party against such liability and indemnify said party from the cost and expense that may have been incurred therein.

In the event that any injury to person or damage to property shall be caused by the joint negligence of both parties, or by the negligence of a joint employee in the operation of their trains over the track covered by this contract (including train employees engaged in operating any train employed in betterment or maintenance of joint track), whether accruing to the parties hereto or to third persons, shall be borne equally by the parties hereto; provided, that in the event of a collision caused by the negligence of both parties hereto or of a joint employee, each party shall at its own expense pick up and remove its own wreckage, and each party shall assume for itself the damage done its property and the property in its charge or control; if the Arkansas company shall fail to promptly pick up and remove such wreckage so to be removed by it, the Kansas City company may pick up and remove it and the cost thereof, plus 10 per cent. (10%), shall be borne by the Arkansas company. Where the loss or damage shall accrue to the property of the parties hereto, or either of them, or to third parties, and it can not be ascertained which party caused such loss or damage, the

expense thereof shall be treated as a maintenance charge and shall be paid in the manner and in the proportion heretofore set forth. Where suit is brought against one of the parties hereto upon a claim or cause of action for which the other party is responsible, the party sued shall notify the other party and turn over the defense of the case, if desired, to such other party, but both parties shall co-operate in the defense of all suits and furnish information therefor each to the other. The rules governing the operation of trains over said track that may be in effect from time to time, shall be considered as the rules of each company party thereto. Train dispatchers, telegraph operators and other employees of the Kansas City company having jurisdiction over the track hereinbefore mentioned, so far as their work is connected with the operation of trains over such track, and employees at the passenger and freight stations at Neosho, such as ticket sellers, freight agents, telegraph operators, warehouse men, baggage handlers, clerks, laborers and all other persons employed in and about the operation of said passenger and freight station, shall be considered as the joint employees of both companies and not as the sole employees of either company."

A supplemental agreement to this was executed on the first day of April, 1910. Under it the plaintiff was allowed to carry passengers between Neosho and Joplin and from Joplin to Neosho. It was also provided in that agreement that section 1 of article 3 above referred to should apply to said local business with like force and effect as if said local passenger business was done by requirement of local statute or order of a railroad commission. The Atchison, Topeka & Santa Fe Railroad Company and the Missouri, Kansas & Texas Railway Company also entered the city of Joplin. These railroad companies, together with the plaintiff and defendant, entered into an operating agreement with the Joplin Union Depot Company on May 2, 1910. The depot company was legally organized under the statutes of Missouri for the purpose of acquiring sufficient yards and terminal facili-

ties in the city of Joplin with which to discharge the duties imposed by law upon all the four railroads above named which enter the city of Joplin. The operating agreement between the depot company and the four railway companies was divided into four articles.

Article 1 contains the grants of the depot company. Under section 1 of article 1 the depot company agreed to acquire necessary land and complete the construction of an union passenger depot and union freight depot and all the sidetracks and other tracks and structures appurtenant thereto. It contained the following:

“The said Union Passenger Depot and Union Freight Depot, and the tracks and other facilities of the depot company, and all additions, betterments, extensions and improvements thereto, and all the facilities appurtenant thereto that are now owned or may be hereafter acquired by the depot company are hereinafter referred to as ‘depot facilities.’ ”

Under section 2 the railway companies are granted for a certain period the right of running their passenger trains into the union depot and over and upon the railroads and road tracks of the depot company. Under section 3 the depot company agreed to keep and maintain a roundhouse, turntable, storage tracks, cleaning tracks and other similar facilities where it would care for and make light repairs on the freight and passenger engines of the railway company.

Under section 4 the right was granted each of the railway companies of running its freight trains drawn by its own motor power and manned by its own crews over said depot facilities or any part thereof.

Under section 5 the depot company agreed for all internal improvements therefor to furnish motive power, switch, move and handle freight cars of the railway companies over the depot facilities.

Under section 6 the depot company agreed to keep and maintain said depot facilities at all times in good repair.

Article 11 covers the payments to be made by the railway companies to the depot company for the services performed for them by the latter.

Section 6 requires the railway companies to pay monthly *pro rata* on a wheelage basis, all the expenses of the operation, maintenance, renewal and repair of the depot facilities, including all salaries, cost of labor, etc. This section also in detail provides the method of determining the contributions by each company.

Article 3 contains the mutual covenants for the operation of the depot facilities.

Section 1 provides that the depot company shall have the exclusive management and control of the operation, maintenance and repair of the depot facilities and shall establish rules and regulations governing the operations of trains over the depot facilities.

Section 2 provides for the removal of any employee of the depot company who shall be deemed incompetent by any of the companies.

Section 6 provides that the payment to be made by the railway companies under section 6, article 2, shall cover only the use and enjoyment of the depot facilities and such services as are for the common benefit of the railway companies.

Section 7 provides that the depot company "shall be liable for all losses and damages suffered or incurred by the railway companies, or by any other corporation or person, through or by reason of any negligence, carelessness, misconduct or other fault of the depot company, or of any of its officers, agents, employees or servants in the management, operation, maintenance, repair, betterment, extension and renewal of the depot facilities; and all sums paid by the depot company under this clause shall be included as part of the maintenance and operating expenses as provided for in section 6, article 2, and shall be paid accordingly."

The facts immediately preceding the collision are substantially as follows: On the 5th of August, 1914, a freight train of the defendant was derailed on its line



south of Neosho and this resulted in a congestion of trains on each side of the wreck. A passenger train going north was made up on the north side of the wreck and was directed by the train dispatcher at Pittsburg, Kansas, who had jurisdiction over the operation of that part of the defendant's line, to proceed as the first section of No. 56, a fast freight train. The train dispatcher at Pittsburg ordered this train to meet a south-bound motor car of the plaintiff carrying the passengers, at Tipton Ford, a point between Joplin and Neosho. The distance between Joplin and Neosho was 19.70 miles and the distance between Joplin and Tipton Ford was 10.70 miles. The order for the two trains to meet at Tipton Ford was sent by the train dispatcher to the operator at Joplin to be by him delivered to the conductor of the motor car of the plaintiff, going south. A copy of his order was also sent from the dispatcher's office to the telegraph operator at Neosho to be delivered to the conductor of the defendant's train going north. The motor car of the plaintiff did not stop at Tipton Ford to await the arrival of the north-bound passenger train of the defendant. The motor car passed the station of Tipton Ford at the rate of about thirty-five miles an hour. The passenger train of the defendant was running at the rate of probably thirty miles an hour. By reason of a curve in the track the operators of the two trains could not see each other until they were very close together. On account of the great force with which the trains ran together the engine of the passenger train plowed through the motor car killing forty-three passengers on it and injured several others. The motor car was entirely demolished. The plaintiff settled the claims for injuries and death losses for the sum of \$154,681.72. Its motor car was destroyed and its value amounted to \$15,666.22. The plaintiff demanded the payment of these amounts together with the accrued interest, making a total of \$189,996.59. This demand was made on December 26, 1916. The claim of the plaintiff against the defendant for this amount was based on the ground that the collision occurred through the negli-

gence of Hadley, a telegraph operator at Joplin. It is alleged that he was the agent of the defendant and failed to deliver the message to the conductor of the motor car of the plaintiff directing him to hold his train at Tipton Ford for the arrival of the northbound passenger train of the defendant. The defendant refused to pay the amount demanded on the ground that the collision did not occur on account of the negligence of Hadley. It also set up as an additional ground that in no event would it be liable for more than one-half of the amount of losses for death and injury to the passengers on the motor car and for nothing on account of the destruction of the motor car. This claim was made on the ground that under the operating agreement between the two companies Hadley was the joint agent of both companies and that losses like the one under consideration were to be shared equally by the two companies. After the collision occurred an agreement was entered into by the parties whereby the plaintiff might settle the claims of third parties and that this settlement should not in any manner interfere with the rights of the parties to this suit under their private contract for the operation of trains of the plaintiff over the tracks of the defendant between Neosho and Joplin. It was also shown that the message directing the two trains to meet at Tipton Ford was sent out from the train dispatcher's office at Pittsburg, Kansas, to the telegraph operators at Joplin and Neosho. The message was delivered by the telegraph operator at Neosho to the conductor of the north bound passenger train of the defendant.

Hadley testified in positive terms that he delivered the message to Nicholas, the conductor of the south bound motor car of the plaintiff. There was also exhibited to the jury the record copy in his office which he testified that Nicholas signed, showing that he had received the message in question. Several handwriting experts who had compared this signature with an admittedly genuine

signature of Nicholas, testified that Nicholas had signed the train record in question.

On the other hand several experts who had made a like comparison testified that it was not the genuine signature of Nicholas. It was also shown that Nicholas was suffering with heat on the day of the collision. Other evidence was introduced on the part of the defendant tending to show that Hadley delivered the message in question to Nicholas.

On the part of the plaintiff it was shown that Nicholas had been a conductor on this part of the road for several years and was thoroughly familiar with it; that he was an old employee of the plaintiff and had always been very careful and painstaking in the discharge of his duties.

Another employee of the plaintiff testified that he saw him after the motor car passed the station at Tipton Ford and that Nicholas waved him a friendly greeting. Several witnesses testified that they saw Nicholas deliver to the engineer of the motor car train orders at Joplin and the engineer read the orders delivered to him in the presence of Nicholas; that after the engineer had read the orders that Nicholas remarked to him that they had a clear track to Neosho and that the engineer seemed to acquiesce in the statement.

The court directed the jury if it found for the plaintiff to find for it in the sum of \$189,996.59 with interest thereon at the rate of six per cent. per annum from December 26, 1916. The jury returned a verdict for the plaintiff. From the judgment rendered the defendant has duly prosecuted an appeal to this court.

HART, J., (after stating the facts). (1-2) It is contended by counsel that a verdict should have been directed in favor of the defendant. This contention is based on the claim that Hadley, whose alleged negligence is relied on for a recovery by the plaintiff, was not the agent of the defendant company but of the Joplin Union Depot Company. Counsel rely upon the agreement of May, 2, 1910,

between the Joplin Union Depot Company and the four railroad companies entering the city of Joplin. It is conceded that the depot company was legally organized under the laws of the State of Missouri, and that the contract between it and the railroad companies was a valid one. It is the duty of the railroad companies to provide proper station house accommodations and safeguard those who may go to stations in order to become passengers or who may be passengers from incoming trains. This duty also extends to receiving and discharging freight. It also includes the providing of proper warehouses, switch tracks, storage tracks, and sufficient station grounds for these purposes. Four different railway companies, including the parties in this action, entered the city of Joplin. For convenience and economy, the persons interested in the four different railroads organized the Joplin Union Depot Company for the purpose of discharging their station duties to the public. In the discharge of that duty the depot company acquired the necessary yards at Joplin for station facilities and erected thereon its own station buildings, tracks and other structures. The contract between it and the railway companies established certain private relations between them which must be considered in any controversy among themselves. By the terms of the contract the depot company employed all the servants who were used in and about the yards of the company at Joplin. This included telegraph operators and also discharged the additional duty of assisting the train dispatchers of the various roads in the operation of trains. These servants are all employed and paid by the depot company. The depot company was paid for its services by the railroad companies in proportion to the number of cars operated over the station facilities by each company. Hadley, the telegraph operator whose negligence is claimed by the plaintiff to have caused the collision was employed by the depot company. The particular clause of the contract between the depot company and the railroad companies relied upon by counsel for the

defendant to establish the liability of the depot company for the negligence of Hadley in this case, is section 7 of article 3. It provides that the depot company "shall be liable for all losses and damages suffered or incurred by the railway companies, or by any other corporation or person, through or by reason of any negligence, carelessness, misconduct or other fault of the depot company, or of any of its officers, agents, employees or servants in the management, operation, maintenance, repair, betterment, extension and renewal of the depot facilities; and all sums paid by the depot company under this clause shall be included as part of the maintenance and operating expenses as provided for in section 6 of article 2 and shall be paid accordingly."

We do not think that this clause of the contract is susceptible of the construction placed upon it by counsel for the defendant. We have already stated the purposes for which the depot company was organized and the duties which it undertook to perform. By the express terms of the contract the "depot facilities" mean the yards and station grounds at Joplin, including the passenger and freight station buildings and other structures and all the tracks within the yard limits. The depot company had complete jurisdiction within the yard limits at Joplin and had complete authority over the servants engaged in carrying out its powers subject to the right of the railroad companies to ask it to discharge servants, for cause, in certain instances. Section 8 provides that each railway company shall pay the liabilities for loss or damage to property and injury or death to persons incurred by the depot company or by any of the railway companies using the depot facilities by reason of any negligence of any of the servants of such railway company. Section 6, article 2, of the contract requires the railway companies to pay on a wheelage basis, all the expenses of operation and maintenance of the depot facilities.

The contract also provides how the proportion of losses of the depot company shall be paid by each railway company. As we have already seen the depot com-

pany has the exclusive management and control of the operation, maintenance and repair of the depot facilities. This contract was entered into between the depot company on the one hand and the four railway companies entering the city of Joplin on the other hand. The depot company was organized exclusively for the purpose of serving these four railway companies within the yard limits in the city of Joplin. It is true its servants performed services in transmitting messages for the railway companies to points beyond its yard limits, but the corporation itself was organized for the purpose of serving the four railway companies within its yard limits at Joplin and its jurisdiction as a corporation did not extend beyond its yard limits. It is evident that all the railway companies were equally interested in the terms of the contract and the contract was entered into for the purpose of defining their mutual duties and obligations to each other.

When all these matters, as expressed in the contract itself, are considered and the particular clause relied upon is read in the light of the other provisions of the contract, it is plain that it was only intended that the depot company should be liable for the acts of its servants in the performance of the duties required of it within the yard limits. The negligence of Hadley which is made the basis of a recovery by the plaintiff in this action, was in failing to deliver the train order to one of the conductors of the plaintiff company directing him to meet a passenger train of the defendant at Tipton Ford, a station about ten miles south of Joplin on the railroad of the defendant. His services in this respect did not have anything to do with the management, operation, maintenance, and repair of the depot facilities as expressed in the contract between the depot company and the four railway companies. Therefore the defendant can not rely upon the contract between the depot company and the four railway companies to escape liability in the present case.

(3) The plaintiff and defendant had fixed their liabilities to each other in cases of this sort by the contract dated December 13, 1907, and the one supplemental thereto, dated April 1, 1910. They alone were parties to these contracts. Section 7, article 3 of the contract of December 13, 1907, provides that in the event that any injury to persons or damage to property shall be caused by the negligence of a joint employee in the operation of trains over the track covered by the contract the loss shall be borne equally by the two railway companies. It provided further that in the event of a collision caused by the negligence of both parties or joint employee, each party shall at its own expense pick up and remove its own wreckage and each party shall assume for itself damage to its own property. Another clause of section 7, provides that each company shall be liable for any injury to persons or damage to property caused by the negligence of its own servants and that the party at fault shall protect the other party against liability incurred by it on account of such loss. The latter part of the same section contains the following:

“Train dispatchers, telegraph operators and other employees of the Kansas City Company having jurisdiction over the track hereinbefore mentioned, so far as their work is connected with the operation of trains over such track, and employees at the passenger and freight stations at Neosho, such as ticket sellers, freight agents, telegraph operators, warehousemen, baggage handlers, clerks, laborers, and all other persons employed in and about the operation of said passenger and freight station shall be considered as the joint employees of both companies and not as the sole employees of either company.”

It is the contention of counsel for the plaintiff that Hadley was the employee of the defendant and that his negligence caused the collision. Therefore they contend that the defendant is liable to them for the whole expense incurred by them in the settlement of claims for damages to third persons and for the damage to the plaintiff's own property.

On the other hand it is contended by the defendant that even if the collision was caused by the negligence of Hadley that he was a joint employee within the meaning of the contract and that it is only liable to the plaintiff for one-half of the damages paid out by it for personal injuries to third persons and is not liable at all for the damage done to plaintiff's property. In making this contention counsel rely upon the concluding part of section 7 which we have quoted above. It will be noted that this section provides in substance that train dispatchers, telegraph operators and other employees of the defendant having jurisdiction over the track hereinbefore mentioned, insofar as their work is connected with the operation of trains over such tracks, shall be considered as the joint employees of both companies and not as the sole employees of either company. The collision occurred between Joplin and Neosho, which was the portion of the track of the defendant covered by the contract in question. The correctness of the contention of the plaintiff in this respect depends upon whether or not Hadley was a telegraph operator within the meaning of those words in the clause of the contract just referred to. Pittsburg, Kansas, which was north of Joplin, was the end of a division of defendant's line of road. Trains south of that point were operated under the direction of the train dispatcher at Pittsburg. He would send or cause messages to be sent out to Joplin, Neosho and other stations on the line of defendant's road within his jurisdiction. He sent a message to Hadley at Joplin, to be delivered to the conductor of plaintiff's motor car going south, to meet at Tipton Ford, number 209, a passenger train on defendant's line of road going north. This same message was sent by the train dispatcher from his office at Pittsburg to the operator at Neosho to be given to the conductor of the passenger train going north which was to meet the plaintiff's train going south at Tipton Ford.

It is earnestly insisted by counsel for the plaintiff that Hadley, the operator at Joplin, was not a telegraph



operator within the meaning of the clause just referred to. We do not agree with counsel in this contention. We think that the words, "telegraph operator" as used, refer to all telegraph operators who assist the train dispatcher in the operation of trains over the track over which he has jurisdiction. Such telegraph operators execute the orders delivered to them by the train dispatchers in connection with the operation of the trains and we think are joint employees of both companies within the meaning of the contract just as much as are train dispatchers whom they assist in the operation of trains. The word "jurisdiction" in Webster's New International Dictionary has three meanings. In law it means the legal power to hear and determine a cause. Second: It refers to the authority of a sovereign power to govern or legislate. Third: It is defined as the limits within which any particular power may be exercised. The last is the meaning which the word necessarily has in the clause of the contract referred to. It means the limits of the road within which the train dispatcher directs the operation of the trains. For instance, the train dispatcher directs the movement of trains over a particular portion of the road. He has jurisdiction over this particular portion of the road, directing the movement and operation of trains. The telegraph operators who receive and transmit his orders, exercise authority within the same limits so far as their work is connected with the operation of trains over the tracks. Therefore we think Hadley was a joint employee within the meaning of this clause of the contract with reference to the delivery of the message in question to Nicholas, the conductor on plaintiff's line of railroad. It follows that even if Hadley was negligent in the respects charged, the defendant would not be liable for the whole amount sued for by the plaintiff. It would not be liable at all for the loss or damage to the property of the plaintiff. It would only be liable to the plaintiff for one-half of the amount paid out by it in the settlement of claims for death and personal injuries received by third persons in the collision.

(4). Section 1, article 3, of the contract of December 13, 1907, provides that the plaintiff shall not do any local freight or passenger business between Neosho and Joplin unless required to do so by some statute or order of a railroad commission. In the event the plaintiff should be required to do such local business, it was provided that it should assume without indemnity, full responsibility for all damage to or loss of property or death of or injury to persons carried, unless under statutes or orders of a railroad commission. By a supplemental agreement of April 1, 1910, it was provided that section 1 of article 3 of the former contract should apply to local business as fully and with like force and effect as if such local passenger business was done by requirement of a legal statute or order of a railroad commission. The record does not show whether or not any of the passengers killed or injured in the collision were local passengers between Joplin and Neosho within the meaning of the clause of the contract just referred to. Therefore, they contend that the judgment should be reversed for this reason because under the clause referred to the plaintiff would be absolutely liable for injuries to such local passengers if any were on board at the time the collision occurred. We do not agree with counsel in this contention. It is a cardinal rule of construction of contracts that each clause must be read in the light of the other portions of the contract. It will be noted that the contract between the parties as to local passengers between Joplin and Neosho was that in the event the plaintiff was required to carry such passengers it should assume, without indemnity, full responsibility for damages on account of carrying such persons the same as though the road was owned and exclusively maintained and operated by it. This refers to damages caused by the defective condition of the track or on account of the negligence of its own servants in operating its trains. It was doubtless recognized that the defendant in reality as owner of the track would be liable as far as third persons are concerned for all damages to persons or property sus-

tained by the operation of trains over its track. It could not escape such liability by giving another company trackage facilities over its road. So we think when this clause of the contract is considered in the light of the other clauses of it, it was intended that the plaintiff in the respects just named, should be liable for damages caused by the condition of the track or by the negligence of its own servants in the operation of trains over it, and should indemnify the defendant for any losses it might suffer thereby. As we have already seen, there was another clause which provided that the liability should be borne equally by the parties when the damage was caused by the negligence of the joint employees. When this construction is placed upon the contract all the clauses in it are harmonized and there is no contradiction between them.

(5) It will be noted from the statement of facts that certain witnesses testified that they saw the conductor, Nicholas, at Joplin hand the engineer of the motor car some orders which he had received at the station there. The witnesses were allowed to state that they saw Nicholas hand some orders to the engineer and saw the engineer read them; that after the engineer finished reading the orders they heard the conductor say to the engineer, there was a clear board or clear track to Neosho.

It is earnestly insisted by counsel for the defendant that the court erred in submitting to the jury the declaration of the conductor to the effect that they had a clear board or track, from Joplin to Neosho. We do not agree with counsel in this contention. It is conceded that it is competent to prove by the witnesses that Nicholas delivered some orders to the engineer and that the engineer read them. These were acts of the parties in the discharge of their duties. It was the duty of the conductor to receive the train orders and to deliver them to the engineer. The engineer read the orders delivered to him by the conductor. The train was about to leave the station and these orders were the guide of the conductor and the engineer in running the train. It was

highly essential that each of them should understand the orders. The declaration of the conductor to the effect that they had a clear board to Neosho and the assent of the engineer thereto was calculated to explain their acts and to show that they both understood that they were not to stop at any intermediate point to await the arrival of the north bound train. All that occurred between the parties at the time the conductor delivered the orders to the engineer was so connected as to constitute one transaction and for that reason distinguished the declaration from mere hearsay. The declaration illustrated the character of the principal transaction, was contemporaneous with it, and derived some degree of credit from it. The main transaction may extend over a longer or shorter period of time according to its nature. Jones on Evidence (2 ed.), secs. 356 and 358, and *Lund v. Inhabitants of Tyngsborough*, 9 Cush. (Mass). 36.

(6) It is next insisted that there is no testimony tending to show that there was any negligence on the part of Hadley in failing to deliver the train order in question but in this contention we can not agree with counsel. It is true Hadley testified in positive terms that he did deliver the order to Nicholas and exhibited a train sheet or record, purporting to have been signed by Nicholas acknowledging the receipt of it. Expert witnesses were introduced who after comparing the signature with admittedly genuine signatures of Nicholas, testified that Nicholas had signed the train sheet or record. There were also other facts and circumstances tending to corroborate the statement of Hadley, but it can not be said that this testimony is uncontradicted. Nicholas had been long in the service of the plaintiff and was perfectly familiar with his duties. He had run over this part of the line of road many times and was thoroughly familiar with it. It was shown that he stated to the engineer after delivering some orders, and they had been read by the engineer, that he had a clear track from Joplin to Neosho. The engineer acquiesced in his statement and the train pulled out. The motor car was not stopped by

Nicholas at Tipton Ford as directed by the order in question. Just after the car passed the station Nicholas waved a friendly greeting to another employee of the company whom he passed. Experts testify that the signature to the train sheet or record referred to above was not the genuine signature of Nicholas. The collision occurred just beyond the station of Tipton Ford and under all the facts and circumstances the jury was justified in inferring that Nicholas did not receive the order or he would have stopped his train at Tipton Ford in compliance with it.

(7) This action was brought by the plaintiff, a corporation, organized under the laws of the State of Missouri, against the defendant, a corporation also organized under the laws of the State of Missouri, in the Benton circuit court, in Benton County, Arkansas.

The defendant filed a petition to remove the cause to the United States District Court for the Ft. Smith Division of the Western District of Arkansas, alleging a Federal question, and the order of removal was granted. The plaintiff filed in the Federal Court a petition to remand the case. This petition was granted and an order was made remanding the case to the State court.

Section 28 of the United States Judicial Code is as follows: "Whenever any cause shall be removed from any State court into the District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

In the construction of this provision in *St. L., I. M. & S. R. Co. v. Neal*, 83 Ark. 591, the court held that where a cause was removed from a State court, and was remanded by the latter court to the former court, the propriety of the remanding order will not be reviewed in the State court. This view of the statute is in accord with the decisions of the Supreme Court of the United

States, some of which are cited in the opinion in that case and need not be repeated here.

The only disputed issue of fact in the present case was in regard to the alleged negligence of Hadley in failing to deliver the telegram in question to Nicholas, the conductor of the motor car which collided with the passenger car of the defendant at Tipton Ford and formed the basis of this lawsuit. That question has been submitted to the jury under proper instructions upon competent evidence and the finding of the jury is against the contention of the defendant. There was evidence of a substantial character to support the verdict of the jury in this respect and it follows that the liability of the defendant to the plaintiff has been established.

Under the views we have expressed in this opinion, the defendant was not liable to the plaintiff for the value of the property of the plaintiff destroyed in the collision. It was only liable to the plaintiff for one-half of the amount of the damages paid by the plaintiff to third persons in settlement of personal injuries and death losses caused by the collision.

To correct the error of the court in these respects the judgment will be reversed and judgment will be entered here for the sum of \$87,165.18, being one-half of \$154,681.72, the amount expended in settling personal injury claims, and interest on same at six per cent. from the date of payment until December 26, 1916, the date of demand, and that this amount, \$87,165.18, bear interest at six per cent. from April 13, 1917, the date of the judgment in the circuit court.

It is so ordered.

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WISNER v. RICHARDSON.

Opinion delivered February 18, 1918.

1. **WILLS—DEVISE OF LAND SUBJECT TO MORTGAGE—DEWISEES TAKE WHAT INTEREST.**—Deceased by will, devised certain property to her brothers and sister, provided they discharge a certain encumbrance thereon. *Held*, the devisees were not required to take

under the will, but if they took the property at all, that they were required to take it subject to the encumbrance. A person can not take the benefits under a will and renounce the burdens. Here the devisees could take the land subject to the encumbrance, or could not take it at all, although they were heirs of the testatrix.

2. **WILLS—EFFECT ON LAW OF DESCENT AND DISTRIBUTION.**—A will arrests the operation of the law of descent and distribution; collateral heirs have no right, such as a widow has, to elect between the provisions of a will and the provisions of the statute.
3. **WILLS—DEBTS OF DECEASED—MARSHALING ASSETS.**—Deceased owned a 40 and a 20-acre tract of land. Upon both were two mortgages given to secure a debt of her husband. By will she devised the 40-acre tract to her brothers and sister, provided they would discharge the whole mortgage debt, and devised the 20-acre tract to her husband, clear. *Held*, the facts did not present an issue for the application of the doctrine of marshaling assets.

Appeal from Randolph Chancery Court; *Geo. T. Humphries*, Chancellor; affirmed.

*J. W. Meeks*, *T. W. Campbell* and *W. L. Pope*, for appellants.

1. Defendant's demurrers should have been sustained. 91 Ark. 400; 94 *Id.* 572; 99 *Id.* 218; 104 *Id.* 459.

2. On the merits both the complaint and cross-complaint should be dismissed for want of equity. 4 Kent, Com. 126-7; 40 Cyc. 1688, 1726; 9 L. R. A. (O. S.) 167; 1 Demblitz on Land Titles, 163; 77 N. E. 458; 95 Ark. 340; 1 Cooley, Blackstone (4 ed.), 560; 97 N. S. 693. The will was without effect as the devisees never agreed to take under it. They renounced it. Where a beneficiary disclaims the will becomes inoperative as to him and he is released from all obligations imposed by it. 40 Cyc. 1898-9; Rood on Wills, § 521; 2 Schouler on Wills (5 ed.), § 1498a.

Plaintiff and cross-complainant are not entitled to subrogation. 126 Ark. 443; Bispham, Eq. (9 ed.), § 338; 19 N. W. 580; 47 *Id.* 102; Beach. Mod. Eq. Jur., § 819; 56 Ark. 563; 50 *Id.* 361; 63 N. Y. 493.

*J. J. Lewis* and *E. G. Schoonover*, for appellee, *Richardson*.

1. Richardson was entitled to subrogation. 108 Ark. 555; 37 Cyc. 365; Bispham, Eq. 338; 40 Ark. 132. He purchased at a judicial sale and acquired no title and was subrogated to the rights of creditors whose debts he paid. 50 Ark. 361; 42 *Id.* 77; 50 *Id.* 484; 55 *Id.* 30; 29 *Id.* 47; 56 *Id.* 563; *Ib.* 574; 84 *Id.* 277; Freeman, Void Judicial Sales, pars. 51-55. Richardson proved every fact necessary to entitle him to relief.

*S. A. D. Eaton*, for appellee, Harper; *Jerry Mulloy*, of counsel.

1. Harper was clearly entitled to subrogation. 90 Ark. 152; 40 Cyc. 1386; 60 Ala. 316; 2 A. K. Marsh (Ky.), 5; 1 Allen, 129; 64 N. Y. 332; 68 N. C. 251; 29 Pa. St. 237; 2 Hill, Eq. 329; 7 Heisk. 65; 40 S. W. 439; 7 Leigh. 419; 31 Pac. 428; 24 N. J. Eq. 277; 88 N. Y. 153; 40 Ark. 132; 50 *Id.* 205; 37 Cyc. 370, 382.

SMITH, J. There are but few disputed questions of fact in this case, and those in dispute are not of controlling importance. The facts may be stated as follows: On March 25, 1912, Mrs. Nannie W. Harper was the owner of the southwest quarter of the northeast quarter of section 32, township 20 north, range 3 east, and a portion of the southeast quarter of the northeast quarter of the same section, and on that date she executed two deeds of trust to the Commonwealth Farm Loan Company, to secure a debt of James A. Harper, her husband, in the sum of \$1,500. One of these deeds of trust was to secure the principal, the other to secure the interest thereon. Mrs. Harper died testate in March, 1915, but named no executor in the will, and her husband was appointed administrator with the will annexed. Under the will Mrs. Harper devised to James, Rufus and John Wisner, her brothers, and Elsie Allen, her sister, the forty-acre tract as tenants in common, but upon the express condition that they should assume and discharge the indebtedness due by the testatrix at her death. The other tract was devised to her husband.



The administrator called upon the devisees of the forty-acre tract to discharge the indebtedness and take the land, but they declined to do so, and repudiated the will. There was never any contest, however, over the will, and the existence and validity of the will is not questioned. Upon the refusal of the devisees of the forty acres to pay the indebtedness and take the land, the administrator applied for, and obtained, an order of sale from the probate court to sell the forty-acre tract. Pursuant to this order, the forty-acre tract was sold to H. L. Richardson for the sum of \$1,225. At this sale Richardson became the purchaser after competitive bidding against the Wisners and Mrs. Allen, who would have been the heirs in case of intestacy, as Mrs. Harper left no children or descendants of children. After the confirmation of this sale in the probate court, James Wisner appealed from this order of confirmation, and the circuit court held that the sale was void because of certain irregularities in connection therewith. This judgment of the circuit court was affirmed on appeal to this court. James A. Harper, the administrator, also sold a twenty-acre tract of land which he, himself, owned, and, with a portion of the proceeds of this sale, and by using all of the money paid him by Richardson, he paid the indebtedness due the loan company, which at that time amounted to \$1,719.

Richardson brought this suit to be subrogated to the rights of the loan company, and Harper, the husband, who was made a defendant, filed an answer and cross-complaint, in which he prayed that he, too, be subrogated to the extent of the portion of the indebtedness paid by him, which amounted to \$494. Various pleadings were filed by the heirs at law, including demurrers to the pleadings filed by both Richardson and Harper. The issue is raised that the right of subrogation did not exist.

The court granted subrogation to Richardson for the sum paid by him and the interest thereon in the forty-acre tract, and granted to Harper subrogation subject to the lien of Richardson.

It is insisted that subrogation should not have been granted to Harper at all, and that, if granted to Richardson, the right should have been given against all the land described in the deeds of trust, and not limited to the forty-acre tract which he purchased. The argument is that subrogation is an equitable relief which is granted only when it accords with equitable principles, and it is insisted that the equities are with the brothers and sisters. They say they have repudiated the will, and that the indebtedness due the loan company, in satisfaction of which the forty-acre tract was sold to Richardson, was the individual debt of Harper, and not the debt of his wife, and they say that, inasmuch as Harper, by selling his twenty-acre tract of land, placed it beyond the reach of the court, the interest given him under the will should first be subjected to the payment of the indebtedness due the loan company.

(1-2) Richardson does not complain that his right of subrogation was limited to the forty-acre tract of land which he bought at the administrator's sale, and we need not, therefore, review the correctness of this limitation. Was the decree correct in other respects? We answer this question affirmatively. Learned counsel for appellants mistake the effect of the will of Mrs. Harper. It is true, of course, that appellants could not be required to pay the debts of their sister, and it is equally true they were not required to take under the terms of the will. But their election in the premises extended only to the right to take, or not to take, under the terms of the will. They could not elect to take the benefits granted by the will, and renounce its burdens. If they elected to claim the property devised to them, they took that property with the burden upon it which the will imposed, and that burden was to pay the debts. They, of course, took no interest in the tract, which was devised by the testatrix to her husband. Appellants refer to themselves as the heirs of their sister. So they are. But the will arrested the operation of the law of descent and distribution. Collateral heirs are not given a right, such as a widow has, to elect

between the provisions of a will and the provisions of the statute. The rights of these collateral heirs depend upon the provisions of the will, and they take only such interest as the will gives them, and by the decree in this cause the court accorded them the right to take the property devised them upon compliance with the terms of the will, that is, to pay the debts. They declined to do so, and can not, therefore, now complain. Decree affirmed.

SMITH, J., (on rehearing). (3) Counsel has filed a petition for rehearing in which it is insisted that we have failed to discuss the point upon which he chiefly relied for the reversal of the decree of the court below. It is, that the twenty acres owned by Harper and which he sold to raise the money to pay the mortgage indebtedness was unaffected by the terms of the will and also that that twenty acres of the land was of sufficient value to pay this indebtedness. It is argued that inasmuch as the mortgage indebtedness was Harper's debt that there should be a marshaling of assets and that the land which Harper took under the will should first be subjected to the demands of Richardson for subrogation.

We did not overlook this contention of counsel. In fact, we considered the original opinion as decisive of the question stated. But that the question may be put at rest, we do now expressly decide that the record in this case presents no question for the application of the doctrine of marshaling assets. It is true, as recited in the decree of the court below, that appellants renounced the provisions of their sister's will, but it also is true that when they did this they renounced all their interest in the land therein devised.

Counsel insist that we are in error in holding that if appellants elected to claim the property devised to them they took that property with the burden imposed by the will, which burden was to pay the debts. Because of the earnestness of this insistence we quote the provisions of the will on that subject, which are as follows:

"I do hereby give, grant and devise unto my brothers, James M. Wisner, John H. Wisner, Rufus Lloyd Wisner and my sister, Elsie Allen, the following real estate, situated in Randolph County, Arkansas, and described as follows, towit: The southwest quarter of the northeast quarter, section 32, township 20 north, range 3 east, to them in common and undivided, to each an undivided one-fourth interest therein, subject, however, to the following terms and conditions, towit: That my said brothers, James M. Wisner, John H. Wisner, Rufus Lloyd Wisner, and my said sister, Elsie Allen, shall assume to pay and shall pay when due all sums either as principal or interest now due or which may hereafter become due by virtue of a certain mortgage held by Commonwealth Trust Company of St. Louis, Mo., which said mortgage is in the sum of \$1,500 with interest at the rate of 8 per cent. per annum from date until paid, and covering certain lands situated in Randolph County, Arkansas, and described as follows, towit: Southwest quarter, northeast quarter; also north part of southeast quarter, northeast quarter; also southeast part of southeast quarter, northeast quarter, all in section 32, township 20, range 3 east; and it is my will that my said three brothers last above named and my one sister last above named shall so assume to pay, and when due to pay and fully satisfy and discharge and release such mortgage and hold my husband, J. A. Harper, harmless therefrom, and in case of the failure of my said brothers or my said sister to so pay and discharge such debts the same shall become and remain a lien upon the respective interests of my said brothers and sister in said land, and their said title thereto shall not vest absolutely in them or either of them until such debt is fully paid and discharged."

The next paragraph of the will specifically devises to Harper the remainder of the testatrix's land and that paragraph provides as follows:

"I do give, grant and devise unto my beloved husband, J. A. Harper, certain real estate situated in Randolph County, Arkansas, and described as follows, towit:

The north part of the southeast quarter of the northeast quarter of section 32, township 20, range 3 east, containing ten acres, more or less, the same to vest in him free of any lien or mortgage thereon, the payment of the existing mortgage thereon to be assumed and discharged by my brothers and sister hereinbefore mentioned."

Now, of course, it is true that when Richardson commenced this suit for subrogation there was no mortgage indebtedness, the same having been paid by Harper in the manner herein stated. But appellants are in no position to take advantage of that fact. Their option, as stated, was to take the land with the burden imposed by the testatrix or not to take it at all, and to grant them now the relief they pray would put upon the land devised to Harper the burden of paying this mortgage indebtedness, whereas the will provided it should "vest in him free of any lien or mortgage." The manifest purpose of the testatrix can not be thus defeated.

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B. F. BUSH, RECEIVER OF ST. LOUIS, IRON MOUNTAIN &  
SOUTHERN RAILWAY CO. *v.* BEAUCHAMP.

Opinion delivered February 25, 1918.

1. CARRIERS—CONTRACT TO CARRY BAGGAGE.—A contract to carry baggage is an incident to the contract to carry the passenger.
2. CARRIERS—BAGGAGE.—Baggage is whatever a passenger takes with him for his own personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate necessities of his journey.
3. CARRIERS—BAGGAGE—LIMITATION BY CARRIER.—A carrier can not, by rules and regulations, limit the recognized meaning of the term "baggage," so as to exclude articles which are usually included in the generally accepted meaning of the term.
4. CARRIERS—BAGGAGE—DIAMOND RING.—A diamond ring of the value of \$300, belonging to a female passenger, held to be baggage.
5. CARRIERS—CONNECTING RAILWAY LINES—LOSS OF BAGGAGE.—As the carriage of baggage is considered as an incident to the contract for the carriage of its owner, a through contract for the transportation of the passenger over several connecting lines

is a through contract for the carriage of his baggage and the initial company, in the absence of any valid limitation, may be held liable for the loss or destruction of the baggage on any of the lines.

6. CARRIERS—LOSS OF BAGGAGE—CONNECTING CARRIERS.—A carrier receiving baggage for transportation to a point in another state, beyond its own line, is liable for its loss occurring upon the lines of a connecting carrier.
7. CARRIERS—LOSS OF BAGGAGE—CONNECTING CARRIERS—RETURN TRIP—LIMITED LIABILITY.—Appellee purchased a round trip ticket to New Orleans from appellant at Little Rock. She delivered her trunk to appellant at Little Rock as baggage, and the same was carried to New Orleans, via the Illinois Central Railway. Returning, appellee delivered the trunk to the Illinois Central Railway at New Orleans, and that company delivered it to the Rock Island Railway at Memphis, which company carried it to Little Rock. On both journeys appellee had placed a diamond ring valued at \$300 in the trunk. She wore the ring in New Orleans, but when the trunk was delivered to her at Little Rock the ring had been stolen. *Held*, appellee could recover from appellant for the loss, but that under the schedule filed with the Interstate Commerce Commission, liability would be limited to \$100.

Appeal from Pulaski Circuit Court, Second Division;  
*G. W. Hendricks*, Judge; affirmed.

*E. B. Kinsworthy* and *W. G. Riddick*, for appellant.

1. Plaintiff was not entitled to recover for loss of jewelry checked as baggage. 111 Ark. 430; 233 U. S. 97.
2. Defendant is not liable for damage not occurring on its own line. 106 Am. St. Rep. 597, 610.
3. Appellee can not recover under the interstate law. Carmack Amendment to Interstate Com. Act, § 20; 233 U. S. 97. The case in 101 Pac. 361 does not apply.

*June P. Wooten*, for appellee.

1. The personal adornments of a woman are part of her wearing apparel and baggage. 123 Fed. 371, 59 C. C. A. 499; 96 *Id.* 832; 158 *Id.* 153; 33 Ind. 379; 3 Pa. 451; 113 S. W. 1019; 88 Ark. 189, 21 L. R. A. (N. S.) 850; 119 S. W. 835; 90 Ark. 462, 21 Ann. Cas. 726; 107 S. W. 147, 48 Civ. App. Tex. 414; 95 N. E. 208, 35 L. R. A. (N. S.) 537; Ann. Cas. 1912, D-1150; 79 U. S. 262; 60 S. W. 343; 103 Ark. 37, and others. See also 3 Wall. 107; 100 U. S. 24.

2. Appellant is liable for loss beyond its own line. 52 Wash. 685, 101 Pac. 361; 25 L. R. A. (N. S.) 537; 5 R. C. L. 809; 74 Ark. 125.

STATEMENT OF FACTS.

Appellee sued appellant to recover damages for the loss of part of her baggage while in appellant's possession for transportation. On February 13, 1917, appellee purchased from appellant a first-class railroad ticket entitling her and her baggage to transportation over appellant's line of railroad and that of the Illinois Central Railroad Company from Little Rock, Arkansas, to New Orleans, Louisiana, via Memphis, Tennessee, and the transportation of herself and baggage on the return trip over the same route. Appellee delivered her trunk containing wearing apparel and a diamond ring, intended for her personal use while in New Orleans. The trunk was transported to New Orleans, and delivered to her there. She wore the diamond ring on various occasions while there and on the 23d day of February, 1917 delivered her trunk containing her wearing apparel and the diamond ring to the Illinois Central Railroad Company at New Orleans to be transported to Little Rock. Appellee arrived at Little Rock on the afternoon of February 24, 1917. She gave the check for her baggage to an expressman and when her trunk was delivered to her she discovered that the lock to it had been torn loose and its contents rifled. The diamond ring was missing and was worth \$300. The trunk was in good condition when she delivered it at the station in New Orleans on the return trip.

One of the grounds of appellant's defense was that it was prohibited from carrying as baggage the diamond finger ring. To support that defense it introduced a regulation which it had filed with the Interstate Commerce Commission, as follows:

"Rule 1. (a) Personal baggage consists of wearing apparel, toilet articles and similar effects in actual use, and necessary and appropriate for the wear, use,

comfort and convenience of the passenger for the purpose of the journey, and not intended for other persons, nor for sale."

"(b) Money, jewelry, negotiable paper and like valuables, fragile or perishable articles, should not be enclosed in baggage to be checked. The carriers issuing and concurring in this tariff will not be responsible for such articles in baggage nor for damages caused by same."

The schedule filed with the Interstate Commerce Commission also contained a provision limiting the free transportation of baggage to 150 pounds and the liability of the railway company to \$100.

The case was tried before the court sitting as a jury. The court found for appellee in the sum of \$100 and from the judgment rendered this appeal is prosecuted.

HART, J., (after stating the facts). (1) The contract to carry the baggage is an incident to the contract to carry the passenger. *Railway Company v. Berry*, 60 Ark. 433, and *Kansas City, F. S. & M. R. Co. v. McGahey*, 63 Ark. 344. Counsel for appellant concedes this to be true, but insists that under the regulations filed by the railroad company with the Interstate Commerce Commission that it was not allowed to carry the diamond ring as baggage. They rely on the case of *Boston & Maine Rd. v. Hooker*, 233 U. S. 97. In that case the railroad company had filed with the Interstate Commerce Commission the schedule of its fares and charges for the transportation of passengers in interstate commerce. The schedule contained a provision limiting the free transportation of baggage to a certain weight and the liability of the railroad company to \$100, followed by a table of charges for excess weight and for excess value. The court held that the limitation of liability of carriers for passenger's baggage is covered by the Interstate Commerce Act and that the Carmack amendment to the Hepburn act applies thereto as well as to liability for shipments of freight.

The court further held that a provision in a tariff schedule that the passenger must declare the value of his



baggage and pay excess charges for the excess liability over the stated value to be carried free, is a regulation within the meaning of the Interstate Commerce Commission Act, and as such is sufficient to give the shipper notice of the limitation. We do not think that case is controlling here. We have in this State a statute defining what shall be considered as baggage. Kirby's Digest, § 6615. Besides the term "baggage" has a meaning which is generally recognized.

(2) In *Chicago, Rock Island & Pac. Ry. Co. v. Whitten*, 90 Ark. 462, the court held that "baggage" may be defined as whatever a passenger takes with him for his own personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate necessities of his journey. This rule has been universally sustained by various courts of the country.

(3-4) In *St. Louis, Iron Mountain & Southern Ry. Co. v. Müller*, 103 Ark. 37, we held that a gold locket and chain for the personal use and convenience of the passenger on the journey was baggage. Mr. Hutchinson says that a woman's jewelry, and every article pertaining to her wardrobe that may be necessary and convenient to her in traveling, is included in the term "baggage." Hutchinson on Carriers (3 ed.), vol. 3, § 1246; *Hasbrouck v. Rd. Co.*, 95 N. E. 808, 202 N. Y. 363, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912, D-1150. Inasmuch as the term "baggage" has a generally recognized meaning, we do not think that the carrier can by rules and regulations limit its meaning so as to exclude articles which are usually included in the generally accepted meaning of the term.

(5-7) It is next contended by counsel for appellant that it can not be held liable for the loss because it occurred on the return trip. The proof shows that the trunk on the return trip was carried over the Illinois Central Railroad Company from New Orleans to Memphis and over the Chicago, Rock Island & Pacific Railway Company from Memphis to Little Rock. The ticket issued to the appellee contained a printed provision, as follows:

"In selling this ticket for passage over other lines and in checking baggage on it, this company acts only as agent and is not responsible beyond its own lines." Appellee purchased a round-trip ticket from appellant. Inasmuch as the carriage of baggage is considered as an incident to the contract for the carriage of its owner, a through contract for the transportation of the passenger over several connecting lines is a through contract for the carriage of his baggage and the initial company, in the absence of any valid limitation, may be held liable for the loss or destruction of the baggage on any of the lines. Elliott on Railroads (2 ed.), vol. 4, 1658, and cases cited. When the trunks were committed to the custody of the appellant's baggage master the company assumed the obligation of its carriage. From the very nature of the transaction appellee could not exercise any further personal oversight of it on the route, nor make any examination at the terminus of each road to ascertain whether or not her trunk was being carried. Appellant knew that the trunk would be delivered to appellee when she arrived at New Orleans, and that she would deliver the trunk to the Illinois Central Railroad Company when she returned to Little Rock. This course must have been necessarily in the contemplation of the parties. This is not the case of the purchase of a coupon ticket where it might be assumed that the passenger would get on and off the train several times during the progress of his journey and thus put the carrier to the trouble and expense of loading and unloading his trunk several times before he reached his destination. Here the appellee purchased a through ticket from Little Rock to New Orleans and return. As above stated, it must have been in contemplation of the parties that the trunk would be delivered to appellee at New Orleans and that she would deliver it into the custody of the carriers for transportation on her return trip. This brings the case squarely within the rule of *Gomm v. Oregon R. & Navigation Co.*, 52 Wash. 685, 101 Pac. 361, 25 L. R. A. (N. S.) 537. Besides, we think under the act of Congress of June 29, 1906, known as the Carmack

Amendment to the Interstate Commerce Act of 1887, a carrier receiving baggage for transportation to a point in another State beyond its own line is liable for its loss occurring upon the lines of a connecting carrier. *Boston & Maine Rd. v. Hooker, supra*. See also *House v. Chicago & Northwestern Ry. Co.*, 30 S. D. 321, 138 N. W. 809, Ann. Cas. 1915-C, 1045.

The facts in the record bring this case within the rule announced in *Boston & Maine Rd. v. Hooker, supra*, as regards the limitation of value and the court properly rendered judgment against appellant for only \$100.

It follows that the judgment will be affirmed.

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FRATERNAL AID UNION v. HIGH.

Opinion delivered February 25, 1918.

1. **APPEAL AND ERROR—UNDISPUTED TESTIMONY.**—On appeal this court does not pass upon questions of mere probability, and the verdict of a jury is conclusive upon disputed questions of fact where any real dispute or controversy exists; it is only when all reasonable minds must reach the same conclusion that this court will say that the testimony is so undisputed that no question of fact is presented for the jury's decision.
2. **LIFE INSURANCE—HEALTH OF INSURED—FINDING OF JURY.**—In an action on a policy of life insurance, the finding of the jury that the insured had not misrepresented his physical condition in his application for insurance, *held* not contrary to the evidence introduced.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little*, Judge; affirmed.

*Hill, Fitzhugh & Brizzolara*, for appellant.

*J. A. Gallaher*, for appellee.

SMITH, J. This is an action instituted by Emma High to recover as beneficiary on a fraternal benefit policy held by her husband, L. M. High, in the Fraternal Aid Union. The sole questions presented are the breach of certain warranties made by High to procure the insur-

ance, and it is earnestly insisted that High was afflicted with syphilis at the time of his application, and that he falsely represented that he had not consulted with any physician within five years, whereas, in truth and in fact he had, within that time and shortly before the issuance of the policy, taken treatment for that disease. It is also insisted, as ground for the reversal of the judgment, that High had falsely warranted that no change of climate or location had been sought or advised for the benefit of his health, when, in fact, he had gone to Hot Springs at the direction of his physician for treatment for syphilis.

The policy was issued on November 1, 1916, and High died on December 2, 1916, after having paid only one assessment. It is said that, if syphilis contributed to his death, he must have been afflicted with it at the time of the issuance of the policy, and physicians testify that this must have been true as a scientific fact, and the truth of that statement is not challenged.

A Doctor Hampson testified that he was a specialist in genito-urinary diseases, and had treated High for a period of a month or two for syphilis, and that in April, 1916, he had sent him to Hot Springs for further treatment for that disease, and he also testified that High had, himself, told him that he had been afflicted with syphilis for six or eight years. A Doctor Morrissey testified that the immediate cause of High's death was a form of meningitis, which was brought on by a tumor of the brain which was produced by syphilis. That there was an enlargement of the glands, which was an evidence of syphilis, and that he examined High for symptoms of other diseases which could have produced his condition and found no indication of any other disease.

(1) It is argued that under this testimony the question of the breach of warranty should not have been submitted to the jury, as no other reasonable conclusion could be drawn from the testimony. It is well understood, however, that we do not pass upon questions of mere probability, and that the verdict of the jury is conclusive upon disputed questions of fact where any real dispute or con-

troversty exists, and that it is only when all reasonable minds must reach the same conclusion that we will say the testimony is so undisputed that no question of fact is presented for the jury's decision. Was the testimony in this case so far undisputed as that a jury, having an intelligent comprehension of the testimony in the case, must necessarily, as reasonable men, have reached the conclusion that High had made false statements in regard to his condition to induce the issuance of the policy sued on? If so, a verdict should have been directed in favor of the insurance company. Otherwise, the cause was properly submitted to the jury.

(2) There was introduced in evidence the affidavit of Doctor Hampson, made as attending physician in connection with the proof of death of High for the collection of a policy which High held in the Brotherhood of American Yeomen. In this affidavit Hampson was required to fill in certain blanks in his own writing, and he there made the following answers: "Q. For what ailments did you treat or advise deceased prior to his last illness? A. Malaria. Q. Give date and duration and result of each. A. 1915—good." He also answered that the immediate cause of death was meningitis and that the first symptoms of that disease appeared on November 29, 1916, three days before High's death. Mrs. High, the wife of the insured, testified that her husband did go to Hot Springs, but that he went there on his vacation and to accompany her and her mother, who went there to take the baths for rheumatism. She testified that she and her husband after their marriage lived together for the eight years immediately preceding his death; that his general health was excellent; that Doctor Hampson had treated her husband only two or three times, and that he had been treated by a physician only five or six times during their married life, and that he was not in bad health. A Doctor Jefery testified for the insurance company, and identified High's application as containing answers given by High in regard to his health. Accompanying this application was his confidential report, in which he stated that High ap-

peared to be a first-class risk for insurance. Doctor Morrisey stated that all he knew about the case personally was the existence of the enlarged glands which he found after High's death. But a Doctor Eberle, who testified for the plaintiff in rebuttal, stated that these enlarged glands would not necessarily indicate syphilis, and that only an autopsy would have certainly revealed whether High had that disease or not. No autopsy was held. Doctor Eberle also testified that the blood test and the clinical test were the ordinary tests for syphilis, and no witness testified that he had performed either of these tests. This physician also testified that, if one had syphilis in a stage so far advanced as to develop into meningitis, his general health would be seriously impaired and his condition would be apparent to any ordinary physician for some time before his death from that disease, and that it would be apparent to the examining physician at least a month before the applicant's death that the applicant's general health was bad and that he was not a first-class risk for insurance. A Doctor Johnson, who was the examining physician for the insurance company, admitted that such might be the case. Doctor Hampson testified that he told officers of the Brotherhood of American Yeomen that High had meningitis, which was caused by a syphilitic tumor.

Under this evidence, we are of the opinion that the jury did not act arbitrarily or capriciously in returning a verdict against the insurance company. The testimony gives support to the finding which the jury must have made that Doctors Hampson and Morrisey were mistaken; that doctors could be mistaken about the existence of this disease in the absence of the use of the standard tests for its detection.

The cause was submitted to the jury under proper instructions, and the judgment is affirmed.

## SECURITY BANK &amp; TRUST Co. v. BOND.

Opinion delivered March 11, 1918.

1. **CONFLICT OF LAWS—CONVERSION—WHAT LAW GOVERNS.**—The law of the State where a conversion takes place, governs an action for damages therefor; but the remedy is governed by the law of the forum.
2. **LANDLORD AND TENANT—CONVERSION OF CHATTELS—REMEDY.**—In order to maintain an action for the recovery of the possession of chattels, or to recover damages for the conversion thereof, plaintiff must show title in the property wrongfully taken or converted, and a landlord with only a lien and without legal title, can not maintain replevin or a suit for conversion. The landlord's remedy is by action against the tenant for recovery of the debt and attachment of the property to enforce the lien, or by suit in equity against the third person who has received the property from the tenant, to subject it to the lien.
3. **ACTIONS—WRONG FORUM—PROPER JUDGMENT—CONVERSION OF CHATTELS.**—An action to recover from a third person for the wrongful conversion of cotton, upon which the plaintiff (landlord) had a lien, was improperly brought at law. *Held*, where no objection to the jurisdiction of the law court was made, and the evidence showed that plaintiff was entitled to recover, that the judgment would not be disturbed on appeal.
4. **CONVERSION—VALUE—FAILURE TO RAISE ISSUE.**—In an action for damages for the conversion of certain cotton, it is too late to raise the issue of the value of the cotton, for the first time on appeal.

Appeal from Phillips Circuit Court; *J. M. Jackson*, Judge; affirmed.

*P. R. Andrews* and *J. G. Burke*, for appellant.

1. It was error to direct a verdict. The issues should have been submitted to a jury. 37 Ark. 193; 120 *Id.* 206; 89 *Id.* 368; 103 *Id.* 401; 82 *Id.* 86.

2. The value of the cotton should have been submitted to a jury. The cotton in value did not amount to \$500.

3. The testimony does not show that the cotton was raised on plaintiff's plantation. It was error to admit McDonald's letter as evidence. 14 Enc. Ev. 718; 89 Ark. 481; 17 Cyc. 945.

*-Moore, Vineyard & Satterfield, for appellee.*

1. The landlord had a lien on the cotton in Mississippi and Arkansas. Code of Miss. (1906), § § 2832, 1260-1-2; 60 Miss. 212; *Ib.* 270; 66 *Id.* 323; 69 *Id.* 371; 95 *Id.* 104; 95 *Id.* 303; 101 *Id.* 724; 75 *Id.* 150; 82 *Id.* 747; 95 *Id.* 576.

2. The court properly directed a verdict, as there was no issue for a jury. 89 Ark. 24; 97 *Id.* 438; 104 *Id.* 267.

3. The value of the cotton was proven, and it was raised by tenants on plaintiff's farm. No prejudicial error is shown. 96 Ark. 156; 94 *Id.* 115; 81 *Id.* 247.

MCCULLOCH, C. J. The plaintiff, Mary D. Bond, owned a plantation in the State of Mississippi and leased the same for a term of three years, beginning with the year 1914, to one McDonald for a rental of \$2,000 per annum. At the close of the first year plaintiff's agent agreed with McDonald to reduce the rent to the extent of \$500 on account of depreciation in the price of cotton caused by the breaking out of the war. The sum of \$1,000 had been paid on the rent at the time this agreement was made, which left \$500 unpaid according to the agreement. Later in the cotton season McDonald had a lot of cotton at a gin in Mississippi, and thirteen bales of it was hauled to the river by one Owens, who operated the gin, and was shipped by boat to the defendant Security Bank & Trust Company, a banking corporation doing business in Helena, Arkansas. The cotton was shipped by Owens at the request of defendant's agent.

Plaintiff instituted this action in the circuit court of Phillips County against the defendant to recover on account of the conversion of the cotton by defendant, and the prayer of the complaint was for the recovery of the balance due on the rent, which was the extent of the plaintiff's interest in the cotton. The case was tried before a jury, and when all the testimony was introduced, the court gave a peremptory instruction to the jury to find for the



plaintiff for the sum of \$500, with interest, and the defendant has prosecuted an appeal to this court.

(1) According to the undisputed evidence, the defendant converted the property in the State of Mississippi. It was situated at a gin in that State, and the owner of the gin, at the request of defendant's agent, hauled the cotton to the Mississippi river and shipped it to appellant at Helena. The act of converting the property having been consummated in the State of Mississippi, the rights of the parties must be tested by the laws of that State. Under the law of Mississippi, a landlord has a lien for rent on all the products raised by a tenant on the leased premises, and a right of action at law against a third person who receives such products from the tenant and converts the same, either with or without notice of the existence of the lien. *Peets & Norman Co. v. Baker*, 95 Miss. 576; *Trenholm v. Miles*, 102 Miss. 835.

(2) The right of action which thus became complete in the State of Mississippi is enforceable here, but the remedy depends upon the laws of this State. In order to maintain an action here for the recovery of possession of chattels, or to recover damages for the conversion of chattels, plaintiff must show title in the property wrongfully taken or converted, and the landlord can not maintain replevin, or a suit for conversion because he merely has a lien and does not hold the legal title. His remedy is by action against the tenant for recovery of the debt and attachment of property to enforce the lien, or by suit in equity against the third person who has received the property from the tenant, to subject it to the lien. *Reavis v. Barnes*, 36 Ark. 575; *Knox v. Hellums*, 38 Ark. 413.

(3) The present action was improperly instituted at law, but no objections were interposed below on that account, nor have there been any such objections raised here, and if the case was correctly decided on the facts, as contended by counsel for the plaintiff, the judgment should not be reversed merely because the action was brought in the wrong court. We are of the opinion that according to the undisputed evidence the plaintiff was entitled to re-

cover, and that the court was correct in giving a peremptory instruction to the jury.

It is contended that the testimony does not show beyond dispute that the cotton received by defendant was raised on plaintiff's farm, but after careful consideration of the testimony we think the jury would not have been warranted in finding that the cotton was not raised on plaintiff's farm, which was leased to McDonald. The testimony of the witness Owens shows that the thirteen bales of cotton converted by defendant were raised by two subtenants of McDonald on plaintiff's farm. McDonald cultivated two other farms that year and some of the cotton that was ginned probably came from the other farm, but the testimony shows definitely that the particular bales of cotton which were shipped to defendant were those raised by the two subtenants on plaintiff's farm.

(4) It is also contended that the value of the cotton as shown by the testimony did not show an amount in the aggregate of the sum of \$500, and that the question of value ought to have been submitted to the jury. Defendant did not ask that that issue be submitted to the jury, although it did in fact ask the court to give several instructions upon other issues. The plaintiff introduced a witness who testified that the cotton was worth \$35 or \$40 a bale. If the higher price was accepted as the criterion of value, the aggregate was more than enough to satisfy the plaintiff's claim, and, if the lower estimate had been accepted, it would have been slightly less than the plaintiff's claim. The defendant knew the classification of the cotton and the prevailing price at the time it was converted and sold, but did not offer any proof on that subject, nor did it ask the court to submit the issue to the jury as to value, and we think it is too late now to raise the question for the first time.

Judgment affirmed.

## JONESBORO, LAKE CITY &amp; EASTERN RD. Co. v. DAVENPORT.

Opinion delivered March 11, 1918.

1. **JUSTICE COURTS—JURISDICTION—ACTION EX CONTRACTU.**—A passenger on a railway train upon arriving at his destination requested the station agent to hold certain baggage for him for several days. This the agent undertook to do, but when the passenger applied for the baggage, the same was lost. *Held*, the relationship between the parties was contractual, and that a justice court had jurisdiction to entertain an action for damages resulting from the loss.
2. **CARRIERS—BAGGAGE LOSS—LIABILITY AS WAREHOUSEMAN.**—When a passenger delivers baggage to a carrier, at his destination, for temporary safekeeping, the carrier's liability changes to that of a warehouseman.

Appeal from Mississippi Circuit Court, Chickasawba District; *W. J. Driver*, Judge; affirmed.

*Coleman, Lewis & Cunningham*, for appellant.

1. The justice had no jurisdiction, and the circuit court acquired none on appeal. 47 Ark. 59; 41 *Id.* 476; 66 *Id.* 346; 114 *Id.* 309; 44 *Id.* 100; 45 *Id.* 346.

2. Defendant was liable only as a warehouseman. 63 Ark. 344; 97 *Id.* 287; 6 Cyc. 456, n. 50, 673, n. 70. Negligence must be shown. 63 Ark. 355; 97 *Id.* 290; 42 *Id.* 200. None was shown.

3. The judgment is in conflict with the special findings. Kirby's Dig., § 6208; 84 Ark. 363.

*G. W. Barham and E. E. Alexander*, for appellee.

1. The court had jurisdiction. 41 Ark. 476; 66 *Id.* 276.

2. The judgment is right and is sustained by the evidence.

## STATEMENT OF FACTS.

The appellee checked two pieces of baggage from Manila, Arkansas, to Jonesboro, Arkansas, over appellant's line of railroad. Appellee went to Jonesboro on the same train with the baggage. When appellee arrived at Jonesboro on Saturday morning it was raining and appellee

asked the baggage agent to permit his baggage to remain in the station until the following Monday morning.

On Monday morning the appellee purchased a ticket from Jonesboro to Manila, surrendered the checks that he had and the baggage agent gave him two other checks, one of the checks calling for the transportation of the appellee's suitcase from Jonesboro to Manila. When appellee reached Manila the suitcase was not delivered to him and had not been delivered to him. The value of the suitcase and its contents was \$98.25.

Appellee was earning \$3.50 a day, and he remained in Jonesboro for four or five weeks on account of not receiving his baggage. Appellee was claiming damages for his loss of time and also for three days' hotel bill at Manila. The total amount of the damages claimed by the appellee was \$148.25. The action was brought by the appellee in the justice of peace court. The appellee filed a written complaint in which he set up and proved substantially the above facts. The appellant answered orally, denied all the allegations of the complaint; objected to the jurisdiction of the court, and pleaded that it became a warehouseman on appellee's request to it to be permitted to store his baggage from Saturday until Monday morning.

The appellant's station agent at Jonesboro testified substantially to the same facts as the appellee. He stated that "our records show that the baggage came into Jonesboro depot from Manila on Saturday preceding the time appellee checked it back to Manila." When appellee arrived at Jonesboro from Manila he asked the witness if it would be all right for him to leave his baggage there a day or two. He left it, came back in a day or two, bought a ticket, surrendered his claim checks and witness issued him two new checks. Witness searched the baggage room and then examined the baggage record. The record showed that the baggage came in on train No. 3 on Saturday and never went out. It was not in the baggage room when witness went to search for it.

The cause was tried before the court sitting as a jury. The appellant asked the court to make the following declaration of facts:

“The defendant has not shown the degree of care required of the warehouseman.” The court refused to make the declaration, but the court then declared the law in substance as follows: “When appellee requested defendant’s agent to place the baggage in the depot and keep it, from the time it arrived Saturday morning until Monday morning, the defendant’s liability changed from that of a common carrier to that of a warehouseman.

“A warehouseman is not an insurer. He is only bound to ordinary and reasonable care of the commodity entrusted to him, and is not liable for its loss, unless it was occasioned by his own negligence. In order to hold the defendant liable for the loss of the suitcase, it was necessary to show that its negligence contributed to the loss.”

The court had its judgment recite as follows: “The court having heard the testimony and argument of counsel doth find that defendant negligently failed to exercise that degree of care required of it and the plaintiff ought to recover for that sum.”

On the motion for a new trial appellant set up that the verdict was contrary to the law and the evidence.

WOOD, J., (after stating the facts). 1. Appellant raises here the issue as to the jurisdiction of the court. Justices of the peace have “concurrent jurisdiction in the circuit court in matters of contract where the amount in controversy does not exceed the sum of \$300, exclusive of the interest.” Art. 7, § 40, Constitution. The facts alleged in the appellee’s complaint were sufficient to state a cause of action *ex contractu*. The relationship between the appellee and appellant with reference to the baggage was contractual. But even if the complaint were in form *ex delicto*, it stated a cause of action for the negligent breach of a contract and was sufficient to give the justice

jurisdiction. *St. L., I. M. & S. Ry. Co. v. Heath*, 41 Ark. 476. See also *Fordyce v. Nix*, 58 Ark. 136.

2. The undisputed evidence shows that the appellant agreed with the appellee to permit his baggage to remain in the depot from Saturday until Monday. When the baggage was placed in appellant's depot at appellee's request the appellant's status changed from that of carrier to that of warehouseman. *Kansas City Southern Ry. Co. v. Thomas*, 97 Ark. 287.

In *Yazoo & M. V. R. R. Co. v. Altman*, we held that, "The nondelivery of the goods upon demand, in the absence of any explanation of their loss by fire, or theft, or in any other manner consistent with the exercise of ordinary care over them, made a *prima facie* case against appellant company." 129 Ark. 358, 196 S. W. 122.

Under the authority of the above case the testimony warranted the court in finding, as recited in the judgment, that the appellant "negligently failed to exercise that degree of care required of it."

3. Appellant contends that the court erred in not making the declaration of facts requested by it. But this refusal of the court was not made a ground of the motion for a new trial. Besides the court found in its judgment that the defendant negligently failed to exercise that degree of care required of it, which finding was equivalent to making the declaration of fact as requested by the appellant.

Judgment affirmed.

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REEVES v. ROMINES.

Opinion delivered March 11, 1918.

1. LEASE—BREACH OF COVENANT OF POSSESSION—DAMAGES.—For breach of an implied covenant for possession in a contract of lease, the measure of damages is the difference between the fair rental value of the demised premises, and the rental price named in the lease; and where the rental value is not proved, the lessee can recover only nominal damages. The lessee cannot recover even nominal damages where he fails to ask anything but special damages in his complaint.

2. **LEASE—BREACH OF COVENANT OF POSSESSION—DAMAGES—RENTAL VALUE.**—"Rental value" is not the probable profits that might accrue to the tenant, but the value, as ascertained by proof of what the premises would rent for, or by evidence of other facts from which the fair rental value may be determined. This rule applies whether the rent is to be paid in money, or where it is part of the crop.
3. **LEASES—UNLAWFUL EVICTION—DAMAGES.**—For an unlawful eviction a tenant is entitled to recover as damages whatever loss resulted to him as a direct and natural consequence of the landlord's wrongful act.

Appeal from Fulton Circuit Court; *J. B. Baker*, Judge; affirmed.

*Ellis & Jones*, for appellant.

1. It was error to sustain the demurrer. The second amended complaint stated the proper measure of damages. 42 Ark. 257; 75 *Id.* 589; 102 *Id.* 108; 110 *Id.* 504.

2. It is not necessary, on demurrer, to state or plead the measure of damages; 43 Ark. 257; 102 *Id.* 108; 206 N. Y. 89; 149 Ky. 65; 143 *Id.* 233.

*Lehman Kay*, for appellee.

1. The complaint is bad on demurrer because it does not allege such a damage as the law allows. 42 Ark. 257; 75 *Id.* 589; 102 *Id.* 108.

2. The court had no jurisdiction. 33 Ark. 633.

#### STATEMENT OF FACTS.

W. M. Reeves brought this suit in the circuit court against John Romines to recover damages for being unlawfully evicted from twenty acres of land which he had rented from Romines. The complaint alleges that on the 19th day of March, 1917, the defendant was the owner of twenty acres of cleared land which he rented to the plaintiff for the year 1917; that the plaintiff agreed to pay as rent one-third of the crops raised on the land; that the defendant represented to the plaintiff that he had the right and authority to rent him said lands for the year 1917; that at the time plaintiff could have rented

other lands upon which to have cultivated a crop, which fact was known to the defendant.

That immediately after renting the lands from the defendant the plaintiff entered upon the premises and began such work as clearing up the land and plowing it, etc., preparatory to planting and raising a crop on it.

That Cinda Esmonds and others instituted an action in the chancery court to enjoin the plaintiff from cultivating or attempting to cultivate the lands on the ground that prior to the 19th day of March, 1917, the defendant, Romines, had rented said land to them for the year 1917. That on the 4th day of April, 1917, the chancery court granted a temporary injunction in said case in accordance with the prayer of the complaint; that on the 2nd day of the regular April term of said chancery court the temporary injunction was made permanent.

The plaintiff states that immediately thereafter he tried to rent other lands in that neighborhood for the year 1917, but on account of the lateness of the season all the lands were rented. The last paragraph of the complaint is as follows:

"That in the premises rented from the defendant there are about twenty acres in cultivation and it was the understanding and agreement by and between this plaintiff and the defendant, John Romines, at the time of the above mentioned rental contract, that this plaintiff was to cultivate about ten acres in corn and about ten acres in cotton; that by reason of being unable to make his said crop for the year 1917, which would have been well and reasonably worth \$600.00, to his part, which is less the cost and expense of production, this plaintiff has suffered damages in the sum of \$600.00."

The prayer of the complaint was for \$600.00. The court sustained a demurrer to the complaint and the plaintiff electing not to plead further, the court dismissed the complaint. The plaintiff has appealed.

HART, J., (after stating the facts). In the case of *Thomas v. Croom*, 102 Ark. 108, the court held, that the measure of damages for a breach of an implied covenant



for possession in a contract of lease is the difference between the fair rental value of the demised premises and the rental price named in the lease; and that where the rental value is not proved, the lessee can recover only nominal damages. In the case of *McElvaney v. Smith*, 76 Ark. 468, the court held that for an unlawful eviction a tenant is entitled to recover as damages whatever loss resulted to him as a direct and natural consequence of the landlord's wrongful act; and that if the rental value of the place from which he is evicted is greater than the price he agreed to pay, he may recover this excess, and any special damages alleged and proved by him. This case is also reported in 6 A. & E. Ann. Cas. 458, and there is a case note citing decisions from numerous States sustaining the rule. By rental value is meant, not the probable profits that might accrue to the tenant, but the value, as ascertained by proof of what the premises would rent for, or by evidence of other facts from which the fair rental value may be determined. It is true in those cases the rent agreed upon was money rent, but there can be no difference in principle where the rent agreed upon was part of the crop.

It is contended by counsel for appellant that even if the rule just announced is the correct measure of damages, still the court erred in sustaining a demurrer to his complaint; and in any event should have rendered judgment in his favor for nominal damages. He cites the case of *Thomas v. Croom, supra*, in support of his contention. It is true that the entire damages, whatever they may be, are to be recovered in one action and the appellant would be right in his contention if he had not asked for special damages only.

Paragraph six of his complaint which has been copied in the statement of facts shows that the only damages he sought to recover in this action were the profits that would have resulted to him from making a crop under the terms of his rent contract had he been permitted to do so. Having based his sole right to recover on this account and having refused to plead further after

the demurrer was sustained to his complaint, he is not now in an attitude to complain that the court did not allow him nominal damages.

Therefore the court correctly sustained a demurrer to the complaint.

Affirmed.

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SHEPARD v. DUDLEY.

Opinion delivered March 11, 1918.

**JUDGMENTS—OFFER TO CONFESS JUDGMENT—COSTS.**—In the absence of a sufficient offer to confess judgment, one who recovers judgment against another for debt, is entitled to judgment also for his costs. The offer to confess judgment is in the nature of a tender, in that it must be absolute and unconditional, and, to be valid as such, it must be so unqualified as that final judgment may be pronounced upon it.

Appeal from Clay Circuit Court, Western District;  
*R. H. Dudley*, Judge; affirmed.

*C. T. Bloodworth* and *J. L. Taylor*, for appellant.

1. Defendant offered to confess judgment and it was error to tax the costs against him. Kirby & Castle's Dig. § 7723; Kirby's Digest, § 6283; 127 Ark. 44; 44 *Id.* 562; 87 *Id.* 5.

*S. A. D. Eaton*, for appellee; *J. Mulloy*, of counsel.

1. The offer to confess judgment was not sufficient. 21 Ark. 559; 30 *Id.* 505-511; 34 *Id.* 582-589.

2. There was no bill of exceptions. 44 Ark. 482; 58 *Id.* 399.

SMITH, J. This is a continuation of the cause reported under the style of *Shepard v. Mendenhall*, in 127 Ark. at page 44. It is a suit to recover the consideration, which was alleged to be two thousand dollars, in a deed to appellant from appellee bearing date June 28, 1915. On November 1, 1915, appellant filed an answer containing the following averment: "Defendant further answering, states the truth to be that the consideration was

\$150.00, as expressed in said deed, and admits that he agreed to pay the sum of \$150.00, and admits that he owes said sum to plaintiff, and that same is due, and hereby offers to confess judgment for said sum, in full satisfaction of said debt, and makes tender of same. Wherefore, having fully answered, he prays to be discharged with costs, and for all proper relief."

Later an amendment to the answer was filed in which it was alleged that the actual consideration for the deed was an agreement to make a will. This amended answer contained the following averment: "Defendant states that he is ready and willing to pay plaintiff the \$150.00 consideration expressed in said deed and has at all times been ready and willing to confess judgment for said sum and to pay same. \* \* \* Wherefore, having fully answered, he prays to be discharged with all costs and for all proper relief."

Upon the trial of the cause there was a verdict for \$150.00 and interest at 6 per cent. from June 28, 1915, and judgment was pronounced accordingly. Appellant filed a motion to retax the costs and to have all costs from the date of the answer charged to appellee upon the ground that the judgment was recovered only for the sum for which he had offered to confess judgment. He bases his prayer for relief upon section 6283 of Kirby's Digest, which provides: "After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action. Whereupon, if the plaintiff being present, refuses to accept such confession of judgment in full of his demands against the defendant in the action, or, having had such notice that the offer would be made, of its amount, and the time of making it, as the court shall deem reasonable, fails to attend, and on the trial does not recover more than was so offered to be confessed, such plaintiff shall pay all of the costs of the defendant incurred after the offer."

Was a sufficient offer to confess judgment made to relieve appellant—defendant below—from liability for

subsequent costs? In the absence of a sufficient offer to confess judgment, one who recovers judgment against another for debt is entitled to judgment also for his costs. The offer to confess judgment is in the nature of a tender, in that it must be absolute and unconditional, and, to be valid as such, it must be so unqualified as that final judgment may be pronounced upon it.

In the chapter on Judgments in Hunt on Tender, section 530, it is said: "A statutory offer of a judgment must be for a specific sum independent of costs, and the costs accrued at the date of the offer; unless the statute provides that the offer shall carry costs, in which case the costs need not be mentioned. An offer of a judgment for a certain sum without mentioning any costs, if not accepted, will not avail the defendant as a statutory offer."

Our statute on this subject contains no provision in regard to costs. Sections 6277, 6278 and 6283, Kirby's Digest.

It can not be said that the rendition of judgment for costs would have followed as a matter of law because of the provisions of law giving one who recovers a judgment for debt a judgment also for costs. This argument would be more plausible if the offer to confess judgment contained no recital in regard to the costs. But this is a statutory proceeding, and only such judgment can be rendered as the defendant offers to confess. Here the defendant, not only did not offer to confess judgment for the costs, but he expressly prayed judgment in his own behalf for his costs. He was not entitled to a judgment for these costs. Upon the contrary, he was liable even for the plaintiff's costs to that time, and we must, therefore, hold that his offer to confess judgment did not meet the requirements of the law. Judgment affirmed.

FRY *v.* WHITE.

Opinion delivered March 11, 1918.

**COSTS—AWARD BY CHANCELLOR—EQUITIES OF THE PARTIES.**—While the chancellor may, in the exercise of a sound discretion, apportion the costs according to equitable principles when the facts justify such action, but that rule is not applicable where one party has superior equities to the other; costs should never be adjudged against one holding superior equities. There is no room for the exercise of a discretion by a chancellor when a superior equity rests in one as against the other.

Appeal from Pope Chancery Court; *Jordan Sellers*, Chancellor; reversed.

*J. G. Wallace & Son* and *J. T. Bullock*, for appellants.

1. Appellants' equities are superior to those of appellee and it was error to adjudge the costs against them. John W. White was not an innocent purchaser. 35 Ark. 103; 43 *Id.* 464; 94 *Id.* 301; 97 *Id.* 398; 103 *Id.* 425; 45 Ark. Law Rep. 197; 95 Ark. 582; 53 Fed. 875; 58 Ark. 91. He is charged with constructive notice. Kirby's Digest, § 762; Jones on Mortg. § 456.

2. White's mortgage was void for uncertainty. 48 Ark. 49; 40 *Id.* 536; 43 *Id.* 353; 35 *Id.* 470; Pom. Eq. Jur. § 654; 1 Jones on Mortg. § 66.

3. White should pay these costs. His remedy is against J. H. Fry.

*Hays & Ward*, for appellee.

1. In chancery cases the question of costs is within the sound discretion of the chancellor. 18 Ark. 207; 19 *Id.* 148; 36 *Id.* 383; 66 *Id.* 7; 80 *Id.* 108, 138; 86 *Id.* 608, 613; 80 *Id.* 280.

2. The findings of a chancellor will not be disturbed unless clearly against the preponderance of the evidence. Here they are not.

HUMPHREYS, J. W. C. Fry, M. M. Fry and J. W. Fry, appellants, and J. H. Fry obligated themselves to pay R. J. Wilson \$50,000, in five equal yearly instalments, balance of purchase money for 2,400 acres of land in

Pope County. Parts of the lands were sold by the Frys in small tracts, subject to Wilson's mortgage, for the purpose of partially liquidating the indebtedness to him. The unsold parts of the lands were partitioned, 480 acres to J. H. Fry and 1,200 acres to appellants, subject to the Wilson mortgage. W. C. Fry, M. M. Fry and J. W. Fry sold 800 acres of the lands apportioned to them to J. H. Fry and L. D. Ford, and as part consideration, said Fry and Ford agreed to pay the balance due R. J. Wilson by the other three Fry brothers, the grantors in said deed. Afterwards, L. D. Ford sold his undivided one-half interest in 680 acres out of the 800 acre tract to R. H. Fry, who was a son of J. H. Fry, and as part consideration, R. H. Fry agreed to pay one-half of the R. J. Wilson mortgage. Subsequently, J. H. Fry executed a mortgage upon his part of said lands to John W. White, the appellee herein, to secure an indebtedness for \$8,300. Default was made in the payment of the R. J. Wilson mortgage to the amount of \$12,578.49 and foreclosure proceedings were instituted in the Pope Chancery Court to collect same out of the entire 2,400 acres of land. Fry and all subsequent purchasers were made parties to the foreclosure proceedings. Judgment was rendered against J. H. Fry, W. C. Fry, M. M. Fry and J. W. Fry for Wilson's debt and a lien was declared upon the entire 2,400 acres to pay same. A sale was ordered, first, of the lands acquired by J. H. Fry and his son. The lands were sold to appellee for \$23,338.48. Out of the proceeds of the sale, the R. J. Wilson debt, interest and costs were paid and the balance applied on appellee's indebtedness. The amount of the bid was sufficient to pay both the R. J. Wilson debt and appellee's debt, but the accrued costs in the Wilson foreclosure suit amounted to \$217.55, and the bid was not sufficient to cover this amount. Appellee having received \$217.55 less than was due him out of the bid, the payment of the costs out of the proceeds, was treated as a payment by appellee to R. J. Wilson for W. C. Fry, M. M. Fry and J. W. Fry, and appellee was subrogated to R. J. Wilson's right as against them. To this

action of the chancellor, exceptions were saved and an appeal has been prosecuted to this court.

Appellants contend that their equities are superior to those of appellee, and that the court erred in placing the costs of the Wilson foreclosure on them. Appellee contends that the cost of the Wilson foreclosure was placed upon appellants by the court in the exercise of a sound discretion, which is conclusive of the case.

Learned counsel for appellee have cited numerous authorities in support of the position that costs are not necessarily adjudged against the losing party in chancery cases, but that the chancellor may, in the exercise of a sound discretion, apportion the costs according to equitable principles when the facts justify. The rule contended for is sound but is only applied when equities between the various parties warrant it. For example, if one party is at fault more than another, it is proper to distribute the costs according to the fault of each; or, if equally at fault, to divide the costs; or to adjudge the entire costs against the party wholly at fault. But the rule is not applicable in cases where one party has superior equities to the other. The costs in that character of case should never be adjudged against a party holding superior equities. For example, a prior lienor should recover the costs necessary to enforce his lien before a junior lienor would be entitled to his debt or costs. There is no room for the exercise of a discretion by a chancellor when a superior equity rests in one as against the other.

Appellee's equities can not rise higher than the equities of his mortgagor, J. H. Fry, unless he can be classed as an innocent purchaser for value. The deeds of date September 2, 1910, partitioning the lands between J. H. Fry and his brothers, were recorded before appellee obtained his mortgage from J. H. Fry, which was constructive notice to him that the lands had been partitioned and conveyed subject to R. J. Wilson's mortgage. Likewise, the deed of date October 13, 1910, from appellants to J. H. Fry and L. D. Ford, was of record and was constructive notice to him at the time he obtained his

mortgages that J. H. Fry and L. D. Ford had assumed the payment of the R. J. Wilson mortgage. Appellee was not an innocent purchaser for the further reason that the deeds in his chain of title apprised him that J. H. Fry, his mortgagor, was obligated to pay the Wilson mortgage. "A subsequent purchaser is affected with notice of all recitals in the title deeds of his vendor, whether recorded or not." *Abbott v. Parker*, 103 Ark. 425, and authorities cited therein on the point. Appellant's equities were superior to the equities of J. H. Fry, according to the title papers, and the recitals therein being sufficient to impart notice to appellee of appellant's prior equities over J. H. Fry, the chancellor erred in subrogating appellee to R. J. Wilson's right to collect the costs out of appellants. Appellee's remedy is against J. H. Fry, his mortgagor.

The decree in favor of appellee against appellants for \$217.55 is reversed.

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PALMER v. PALMER.

Opinion delivered March 11, 1918.

1. CONSTITUTIONAL LAW—AMENDATORY STATUTES—RE-ENACTMENT.—Where amendatory statutes conferring rights or granting powers are re-enacted at length, it is permissible to adopt remedies and procedure by reference only, and such method does not offend against § 22, Art. 5 of the Constitution of 1874.
2. FENCING DISTRICTS—STOCK RUNNING AT LARGE.—By the passage of Act 183, Acts of 1915, *held*, the Legislature intended to fully and completely reinstate Act 17, Acts of 1905, so as to permit Clark County, or any subdivision thereof, not less than five square miles, to be organized into districts to prevent hogs from running at large.

Appeal from Clark Circuit Court; *Geo. R. Haynie*, Judge; reversed.

*Callaway & Huie*, for appellants.

1. The court should have required appellees to elect on which petition they would stand. It should have refused the petition for *certiorari*, because any interested



party could have appealed, and having failed to do so, they are bound by the order of the county court.

2. The county court had jurisdiction to establish the district. Act 183, Acts 1915, is not unconstitutional. It amends Act 262 of 1905, and the courts should construe the act as if the original act had been originally enacted as amended. 91 Ark. 243; 89 *Id.* 598; 55 *Id.* 389; 73 *Id.* 600. See also 61 Ark. 622-5; 64 *Id.* 467-9; 120 *Id.* 165-8.

3. Under these decisions Act 183 of 1915 amending Act 262 of 1905, a majority of qualified electors have the power to form a fencing district. 91 Ark. 243.

*McMillan & McMillan*, for appellees.

1. The county court had no jurisdiction and *certiorari* was the proper remedy. 38 Ark. 159; 44 *Id.* 509; 124 *Id.* 234.

2. The Clark County Court had no jurisdiction to establish the hog district in Amity Township. Act 17 of 1905. Act 79 of 1905 amends Sec. 1. Act 262 of 1905 repeals Act 17 of 1905. Act 183 of 1915 gives Clark County jurisdiction to establish a district in Amity Township. A repealing statute can not be amended so as to bring back into existence the repealed statute. Kirby & Castle's Dig. § 9724; 120 Ark. 167; 52 *Id.* 295; 49 *Id.* 131. The county court had no authority to establish a district.

HUMPHREYS, J. Amity Township, in Clark County, was organized, on the 31st day of July, 1916, into a district to prevent hogs from running at large, under Act 17, Acts 1905. On the 22nd day of June, 1917, appellees filed a petition in the county court of Clark County to abolish the district. Upon hearing the county court abolished the district, from which an appeal was prosecuted to the circuit court. While that appeal was pending, appellees applied for a writ of *certiorari* to bring up the original order establishing the district, alleging that the district, as organized, was void for the reason that the county court had no authority under Act

17, Acts 1905, to establish same. Both proceedings being in the circuit court, a motion was made by appellants to require appellees to elect on which petition they would stand. The court overruled the motion and proceeded to hear the petition for writ of *certiorari*. The cause was submitted upon the petition, the answer of the county clerk, the response to the petition, the original papers in the cause and a transcript of the proceedings and judgment of the county court, from which the court found that the county court had no authority under the law to establish the district. In keeping with the finding, a judgment was rendered dissolving the order establishing the district, from which an appeal has been prosecuted to this court.

The only question to be determined is whether Act 183, of Acts 1915, amended Act 17 of Acts 1905, so as to authorize the county court to include Amity Township in a district to prevent hogs from running at large. Act 17, of Acts 1905, as originally passed, applied to all, or any part not less than five square miles, of Clark County. Later in the session, the Legislature passed Act 262, which amended section 1 of Act 17 so as to exclude Amity Township and certain other territory in Clark County from the act. Act 183, of Acts 1915, amended Act 262, amending section 1 of Act 17, Acts of 1905, so as to include Amity Township and other territory in Clark County within the act. This, in effect, amended section 1 of Act 17, 1905, the same as if it had directly amended section 1 of said Act 17. It is insisted that Act 262 of Acts 1905 repealed section 1, Act 17, Acts 1905, and that the amendment of a repealing statute does not have the effect of reviving the original statute amended. In support of this contention, section 7796 of Kirby's Digest is cited, which is as follows: "When a statute shall be repealed and the repealing statute shall afterwards be repealed the first statute shall not thereby be revived except by express words." This section of the statute has no bearing here because Act 262 was not a repealing statute. It was an amending statute. It amended sec-

tion 1 of Act 17, Acts 1905, by excluding Amity Township and other territory in Clark County from the effect of the act.

(1) It is insisted that Act 183, Acts 1915, was void because it offended against section 22, Article 5 of the Constitution of 1874, which provides that "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length." Appellees are not correct in this contention because section 1 of Act 183, Acts 1915, was a re-enactment of section 1 of Act 17, Acts 1905. It is true that the latter part of section 1 of Act 183, Acts 1915, refers to section 2 for the procedure prerequisite to the organization of such a district. Where amendatory statutes conferring rights or granting powers are re-enacted at length, it is permissible to adopt remedies and procedure by reference only, and such method does not offend against section 22, article 5 of the Constitution of 1874. *Watkins v. Eureka Springs*, 49 Ark. 131; *Common School Dist. No. 13 v. Oak Grove Special School Dist.*, 102 Ark. 411; *State v. McKinley*, 120 Ark. 165; *Harrington v. White*, 131 Ark. 291, 199 S. W. 92; *Fenolio v. Bridge District*, ms. op.

The effect of the passage of Act 183, Acts 1915, was to set section 1 of said act in the place and stead of section 1 of Act 17, Acts 1905. It was said by Mr. Justice Hemingway in the case of *Mondschein v. State*, 55 Ark. 389, that "The amendatory provision, from and after its passage, became a part of the act (meaning the original act), and, in its relation to the other sections of the act, stands with reference to future transactions as though the act had been originally enacted in the amended form."

(2) It is quite clear that the Legislature intended by the Act 183, Acts 1915, to fully and completely re-instate Act 17, Acts 1905, so as to permit Clark County, or any subdivision thereof not less than five square miles.

to be organized into districts to prevent hogs from running at large.

The court was in error in holding that the county court was without authority to establish Amity Township into such a district.

The judgment is reversed and the cause remanded with instructions to enter a decree dismissing the petition for writ of certiorari.

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HUDSON v. QUATTLEBAUM.

Opinion delivered March 11, 1918.

1. DRAINAGE DISTRICTS—ORGANIZATION—DESCRIPTION OF LANDS INCLUDED.—In the organization of a drainage district, the boundaries may be designated and described by reference to natural or artificial monuments; the engineer or surveyor is not required to outline the boundaries of lands by reference to plats only. If the boundaries of the district or the boundaries of the lands contained therein are described so that the land owners and county courts can understand where they are, such description would be sufficient. A survey or description referring to the only plat or map on file in the county, and in general use, is a sufficient description by which to designate and locate the boundary lines of a drainage district or the boundary lines of the lots of land contained therein.
2. DRAINAGE DISTRICTS—ORGANIZATION—CONTIGUOUS LANDS.—In the organization of a drainage district, *held*, a reference to the original plat, made a part of the transcript on appeal, showed that the lands sought to be embraced within the district, were contiguous.

Appeal from Jefferson Chancery Court; *Jno. M. Elliott*, Chancellor; affirmed.

*Earl S. Wood*, for appellant.

1. The court erred in dismissing the complaint and in holding the district valid. The lands, as shown by the official plat, are not contiguous. 196 S. W. 930.

*Crawford & Hooker*, for appellees.

1. 196 S. W. 930 differs from this.
2. The lands are contiguous according to the plat used in Jefferson County for years. 75 Ark. 400.

HUMPHREYS, J. Appellant brought suit in the Jefferson Chancery Court against the Commissioners of Flat Bayou Drainage District, appellees herein, to enjoin the commissioners from issuing bonds or performing any other act, for the alleged reason that lot 2 in the S. W.  $\frac{1}{4}$  of Sec. 19, and lot 2 in the N. W.  $\frac{1}{4}$  of Sec. 30, T. 3 S., R. 8 W., in Jefferson County, Arkansas, included in the district, are separated from the body of the district by lot 3 in said quarter section, thereby constituting a district of non-contiguous territory. Appellee answered, denying that lot 2 in the S. W.  $\frac{1}{4}$  of Sec. 19, and lot 2 in the N. W.  $\frac{1}{4}$  of Sec. 30, T. 3 S., R. 8 W., are separated from the body of the district by lot 3 in said quarter section.

The cause was heard upon the pleadings, the deposition of W. J. Parkes, with the exhibits thereto, and the certificate of G. W. Byington Abstract Company. The court found that, according to the only official plat of the lands on file and in use in Jefferson County when the district was organized, lot 2 in each quarter section aforesaid included the same lands as lots 2 and 3 specified in plaintiff's complaint, and that the district is composed of entirely contiguous territory and dismissed appellant's bill for the want of equity. From the decree dismissing the bill an appeal has been prosecuted to this court.

The evidence disclosed that the government plat of date January 17, 1826, on file in Jefferson County, and the United States Land Office in Little Rock, only contained two lots numbered 1 and 2 in each quarter section; that all conveyances of said lands from the United States Government down to the present owners described the lands in accordance with said plat; that after the government parted with its title to said lands under the description aforesaid, in accordance with the description in said plat, the original plat was amended by the United States Government on February 25, 1859, so

as to divide each original lot 2 into lots 2 and 3 in each quarter section; that the amended plat was filed in the United States Land Office at Little Rock but never filed in Jefferson County, and no one in Jefferson County knew of the existence of the amended plat, and, for that reason, was not used for descriptions in conveying lands in that county; that the original plat is the only plat used by the people of Jefferson County in laying off and locating their lands; that all the engineers and surveyors refer to the original plat in making their surveys; and that a reference to any other plat would not be understood and would be misleading to the people of the county, and that the district in question was organized and outlined by the engineer by reference to the original plat.

(1-2) In the organization of drainage districts, it is provided by section 1 of Act 279, Acts 1909, as follows: "The said engineer shall forthwith proceed to make a survey and ascertain the limits of the region which would be benefited by the proposed system of drainage; and such engineer shall file with the county clerk a report showing the territory which will be benefited by the proposed improvement, \* \* \*." We are not familiar with any law requiring an engineer or surveyor to outline the boundaries of lands by reference to plats only. The boundaries to lands may be designated and described by reference to natural or artificial monuments. If the boundaries of the district or the boundaries of the lands contained therein are described so that the land owners and county court can understand where they are, such description would be sufficient. We think a survey or description referring to the only plat or map on file in the county, and in general use, is a sufficient description by which to designate and locate the boundary lines of a drainage district or the boundary lines of the lots of land contained therein. By reference to the original plat, made a part of the transcript in this case, it is definitely established that all the lands embraced within the district are contiguous.

The case of *Heinemann v. Sweatt et al.*, 130 Ark. 70, 196 S. W. 931, is cited to the effect that it is improper to include in drainage districts non-contiguous lands. It was not decided in that case that all lands embraced within a drainage district must necessarily be contiguous lands, nor do we commit ourselves to such a doctrine by anything said in this opinion. The case of *Heinemann v. Sweatt* has no application in this case for the further reason that the lands embraced within the district are shown to be contiguous.

No error appearing in the record, the decree of the chancellor is affirmed.

# APPENDIX.

## I.

### OPINIONS OMITTED.

Hollenberg Music Co. *v.* Williams; appeal from Arkansas Chancery Court; John M. Elliott, Chancellor; reversed January 14, 1918, *per* Smith, J.

Nimnich *v.* Bank of Corning; appeal from Clay Circuit Court, Western District; R. H. Dudley, Judge; affirmed January 28, 1918, *per* McCulloch, C. J.

National Bank of Commerce *v.* Plater; appeal from Benton Chancery Court; B. F. McMahan, Chancellor; affirmed January 28, 1918, *per* Smith, J.

Tull *v.* Ball; appeal from Saline Circuit Court; Scott Wood, Judge on exchange; affirmed February 11, 1918, *per* McCulloch, C. J.

Leonard *v.* Dixon; appeal from Prairie Circuit Court, Northern District; W. A. Leach, Special Judge; affirmed February 5, 1918, *per* Hart, J.

Walden *v.* Kirkland; appeal from Yell Chancery Court, Dardanelle District; Jordan Sellers, Chancellor; reversed February 11, 1918, *per* Smith, J.

Commercial Bank of Alma *v.* Yoes; appeal from Crawford Circuit Court; James Cochran, Judge; reversed February 1, 1916, *per* McCulloch, C. J.

Saling *v.* Chess & Wymond Co. of Ark.; appeal from White Circuit Court; J. M. Jackson, Judge; reversed February 18, 1918, *per* Wood, J.

Iverson *v.* Rowland; appeal from Jefferson Circuit Court; W. B. Sorrells, Judge; affirmed February 25, 1918, *per* Wood, J.

Euart *v.* Alling; appeal from Cross Chancery Court; Edward D. Robertson, Chancellor; affirmed March 4, 1918, *per* McCulloch, C. J.

Stanley *v.* White; appeal from Phillips Circuit Court; J. M. Jackson, Judge; affirmed March 4, 1918, *per* Hart, J.

Lowery *v.* Waldrop; appeal from Montgomery Circuit Court; Scott Wood, Judge; affirmed March 11, 1918, *per* McCulloch, C. J.

Yoes *v.* Commercial Bank of Alma; appeal from Crawford Circuit Court; James Cochran, Judge; affirmed March 11, 1918, *per* Wood, J.

Arkansas Land & Lumber Co. *v.* Wilson; appeal from Hot Spring Circuit Court; W. H. Evans, Judge; affirmed March 11, 1918, *per* Hart, J.



## II.

## CASES DISPOSED OF ON MOTION.

W. E. Flick, as Administrator of the Estate of D. A. Ritner, Deceased, *v.* William Fish and Gamewell Fish; Polk Circuit Court; Jefferson T. Cowling, Judge; a motion of the appellee to dismiss the appeal was overruled January 1, 1918, and the face of the record showing no error, the judgment was affirmed; *per curiam*.

Mose Brown *v.* W. H. Evans, Judge of the Seventh Judicial Circuit; mandamus to Hot Spring Circuit Court; petition for mandamus denied, January 14, 1918; *per curiam*.

Dave Golden *v.* The State of Arkansas; Garland Circuit Court; Scott Wood, Judge; appeal dismissed February 25, 1918, for failure to lodge transcript within the time limited by statute; *per curiam*.

Marshall Claiborne *v.* The State of Arkansas; Garland Circuit Court; Scott Wood, Judge; appeal dismissed February 25, 1918, for failure to lodge transcript within the time limited by statute; *per curiam*.

George Bean *v.* The State of Arkansas; Garland Circuit Court; Scott Wood, Judge; appeal dismissed February 25, 1918, for failure to lodge transcript within the time limited by statute; *per curiam*.

Allen Powers *v.* The State of Arkansas; Garland Circuit Court; Scott Wood, Judge; appeal dismissed February 25, 1918, for failure to lodge transcript within the time limited by statute; *per curiam*.

Jim Denton *v.* H. Prothro; Pulaski Circuit Court, Third Division; G. W. Hendricks, Judge; appeal dismissed February 25, 1918, for non-compliance with rule 9; *per curiam*.

A. W. Gills *et al.* *v.* J. C. Rogers *et al.*, Commissioners of Waterworks Improvement District No. 1, and Sewer Improvement District No. 1 of the Town of Rector; Clay Chancery Court, Eastern District; Archer Wheatley, Chancellor; appeal dismissed March 4, 1918, pursuant to section 5706, Kirby's Digest, for failure to perfect appeal within twenty days; *per curiam*.

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